Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

DR. MARJORIE C. MCMILLAN,

Petitioner,

v.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS; DR. GUS THORNTON AND DR. PAUL GAMBARDELLA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, after a jury has found the respondents' actions to comprise intentional and willful discrimination that caused the petitioner to suffer substantial harm, and the court of appeals has affirmed the liability finding, the court of appeals violates the Reexamination Clause of the Seventh Amendment by vacating the jury's award of punitive damages on grounds that the respondents' actions were not "egregious enough for an award of punitive damages."

2. Whether a court of appeals may, consistent with a party's Seventh Amendment rights, deny that party a remand for a new trial or remittitur of damages, after determining that the damages award was excessive and/or otherwise unwarranted.

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PETITION FOR A WRIT OF CERTIORARI

Dr. Marjorie C. McMillan hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 140 F.3d 288 (1st Cir. 1998). The order of the court of appeals denying rehearing (App., *infra*, 45a) is reported at 140 F.3d 312. This Court's grant of an extension of the date for filing this petition for a writ of certiorari (App., *infra*, 61a) is not published. The district court's November 12, 1996 Memorandum and Order on Defendants' Motion For Relief From Judgment Or In The Alternative For A New Trial (App., *infra*, 47a) is not reported. The district court's order denying petitioner's motion on remand to set a remittitur of punitive damages, with alternative of a new trial on same (App., *infra*, 60a) is not reported. Pending in the court of appeals is petitioner's petition for a writ of mandamus regarding a portion of the second question presented herein.

JURISDICTION

The opinion of the court of appeals was issued on March 18, 1998 (App., *infra*, 1a). The petition for rehearing was denied on June 16, 1998 (App., *infra*, 45a). Upon petitioner's motion, on September 8, 1998 this Court granted an extension until November 13, 1998 of the date

for filing this petition for a writ of certiorari under Supreme Court Rule 13(5) (App., *infra*, 61a).[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides, in pertinent part, that:

> . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Massachusetts General Laws chapter 151B § 4(4) provides, in pertinent part, that:

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[1] The extension was granted in order to permit the district court and the court of appeals to state their interpretation of an ambiguous section of the court of appeals' March 18, 1998 decision regarding punitive damages. The district court denied petitioner's motion to set a remittitur of punitive damages, with alternative of a new trial on same, on October 6, 1998. Now pending before the court of appeals is petitioner's petition for a writ of mandamus, requesting that court to issue a writ of mandamus to the district court compelling the district court to reverse its October 6, 1998 Order and to grant plaintiff's motion. Although the court of appeals has not yet ruled on that motion, petitioner is submitting her petition for the writ of certiorari in order to meet this Court's filing deadline, and is proceeding on the assumption that the court of appeals' intentions regarding the punitive damages award were properly understood by the district court.

> It shall be an unlawful practice:
>
> 1. For an employer, by himself or his agent, because of the . . . sex . . . of any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment. . . .

Massachusetts General Laws chapter 151B § 9 provides, in pertinent part, that:

> The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. . . .
>
> Any person claiming to be aggrieved by a practice made unlawful under this chapter . . . may . . . bring a civil action for damages or injunctive relief or both. . . .
>
> . . . If the court finds for the petitioner, it may award the petitioner actual and punitive damages. . . .

STATEMENT OF THE CASE

Petitioner, Dr. Marjorie C. McMillan, is a veterinary radiologist and avian expert. This case arises out of Dr. McMillan's employment as department head of radiology at Angell Memorial Animal Hospital, a facility owned and operated by respondent Massachusetts Society for the Prevention of Cruelty to Animals ("MSPCA"). Petitioner proved at trial that respondents MSPCA and Dr. Gus Thornton, Angell's chief of staff and later, president of the MSPCA, intentionally discriminated against her by paying her less than the similarly situated men who

headed up Angell's other veterinary medicine departments.[2] This determination was affirmed on appeal.

In 1992, petitioner brought claims in the United States District Court for the District of Massachusetts alleging, *inter alia*, salary discrimination under the federal Equal Pay Act, 29 U.S.C. § 206, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 et seq., and the Massachusetts Fair Employment Practices Law, Mass. G.L.c. 151B. Federal jurisdiction was based on 28 U.S.C. §§ 1331 and 1343(a)(4), 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 216(b). The Title VII claim was dismissed on summary judgment.

The matter was tried to a jury in December 1995. Under Mass. G.L.c. 151B, the jury awarded petitioner compensatory damages of nearly $184,000 against the MSPCA and Dr. Thornton, and punitive damages totaling over $306,000 against the MSPCA and Dr. Thornton. App., *infra*, 8a, 64a-65a. In response to a special question regarding the federal Equal Pay Act, the jury found that the MSPCA had acted willfully in paying Dr. McMillan less than her male counterparts. App., *infra*, 64a.

Respondents filed post-trial motions raising a number of issues under both F.R.Civ.P. Rule 50 and Rule 59. The district court denied the Rule 50 motion with respect to punitive damages, dismissing it out of hand because respondents had waived the issue by failing to address punitive damages in their motion for a directed

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[2] Respondent Paul Gambardella was named in Dr. McMillan's suit with regard to claims not pertinent to this petition.

verdict. App., *infra*, 53a. The district court denied respondents' Rule 59 motion on the merits, and affirmed the jury's compensatory and punitive damages awards on the salary discrimination claims. App., *infra*, 58a-59a.

Respondents appealed the judgment to the court of appeals. On March 18, 1998, the court of appeals affirmed the district court's back pay award, but vacated the punitive damages award as "grossly excessive" and "shock[ing] to the conscience". App., *infra*, 33a.[3]

In light of this Court's decisions in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) and *Hetzel v. Prince William County, Va.*, ___ U.S. ___, 118 S.Ct. 1210 (1998), petitioner understood the court of appeals' determination that the punitive damages award was excessive to require a remand to the district court for a remittitur of the award in an amount to be determined by the district court, or for a new trial, should petitioner reject the remittitur.[4] Accordingly, petitioner moved the district court to set a remittitur, with the alternative of a new trial

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[3] The court of appeals' discussion of the punitive damages issue is found at App., *infra*, 30a-33a. Petitioner sought rehearing regarding, *inter alia*, the punitive damages issue. Rehearing was denied on June 16, 1998. App., *infra*, 45a-46a.

[4] The court of appeals also reduced the back pay award by an amount equaling petitioner's assessment of the value of lost benefits, on grounds that there was insufficient evidence that petitioner actually lost any benefits as a result of her discriminatory salary level. App., *infra*, 29a-30a. Petitioner believes that aspect of the decision similarly violated the Seventh Amendment, and requires a new trial on lost benefits, as discussed *infra*, fns. 13 and 14.

in the event that she were to reject that figure. Respondents opposed the motion on grounds that the court of appeals' decision did not order consideration on remand of the punitive damages issue and left no room for any punitive damages award.[5]

On October 6, 1998, the district court denied petitioner's motion for remittitur or a new trial, explaining that

> The First Circuit was clear in its holding that no reasonable jury could have found defendants' conduct "sufficiently worthy of condemnation and deterrence to justify exemplary damages" and that a compensatory award was all that plaintiff was entitled to. App., *infra*, 60a.

Thereafter, because it appeared that such a disposition was inconsistent with this Court's holdings in *Gasperini*, *supra*, and *Hetzel*, *supra*, on October 20, 1998 petitioner filed with the court of appeals a petition for a writ of mandamus, requesting that court to compel the district court to reverse its October 6, 1998 order and to grant the motion for a new trial or remittitur. That petition for a writ of mandamus (which would, if granted, resolve the second issue presented herein insofar as punitive damages are concerned), is pending. In order to meet

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[5] Meanwhile, in order to fully preserve her rights in the event that her interpretation of the court of appeals' decision did not prevail, petitioner applied to this Court for an extension of time for filing her petition for a writ of certiorari to review the court of appeal's March 18, 1998 decision on punitive damages. On September 8, 1998 this Court granted petitioner an extension until November 13, 1998 to file her petition for certiorari. App., *infra*, 61a.

this Court's deadline for submitting her petition for a writ of certiorari regarding the court of appeals' March 18, 1998 decision, petitioner is proceeding on the assumption that the court of appeals will deny the petition for a writ of mandamus and will endorse the district court's understanding of the court of appeals' March 18, 1998 decision.[6]

REASONS TO GRANT THE PETITION

Certiorari should be granted in this case because the decision of the court of appeals violates the Reexamination Clause of the Seventh Amendment to the United States Constitution. The decision below is doubly problematic. According to this Court's precedents, the Reexamination Clause precludes courts of appeal from overturning juries' factually-supported findings. Once a jury finds liability and that finding withstands a challenge for factual insufficiency, and a district court thereafter denies the defendant's Rule 59 motion to set aside an award as excessive or to order a new trial on damages, the Seventh Amendment limits the appellate courts' role to reviewing the district court's denial of the defendant's Rule 59 motion under an abuse of discretion standard. *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal*, 492 U.S. 257, 279 and n.25 (1989), cited in *Gasperini, supra*, 518 U.S. at 435.

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[6] Should the court of appeals issue the requested writ of mandamus, petitioner will promptly notify the Court and withdraw the second question presented herein insofar as the punitive damages matter is concerned.

The court of appeals' decision here goes well beyond an inquiry into the excessiveness, *vel non*, of the jury's punitive damages award to declare that respondents' intentional and willful discrimination did not warrant a punitive damages award at all, in direct contradiction to the jury's factually-supported finding and in violation of the Seventh Amendment. The court of appeals made this declaration despite having affirmed the jury's liability finding of intentional discrimination, and the finding that this discrimination cost petitioner over $150,000 in lost salary. By substituting its own judgment for that of the jury on a factual matter, the court of appeals' decision dramatically expands appellate courts' power, and, in an unprecedented manner, cuts back on the Seventh Amendment's prohibition of appellate reexamination of a jury's factual findings. If allowed to stand, this decision will provide authority for the courts of appeals to subject parties to unconstitutional appellate court encroachment upon matters the Constitution requires to be determined by the jury.[7]

Second, the writ should be granted because the court of appeals' decision baldly disregards two important recent Seventh Amendment rulings of this Court. By vacating the punitive damages award without permitting a new trial or remittitur on that issue, the court of appeals effectively remitted the punitive damages award to zero.

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[7] Petitioner notes that this Court granted certiorari on November 2, 1998 in *Kolstad v. American Dental Association*, 139 F.3d 958 (D.C. Cir. 1998), which raises related issues concerning the respective roles of juries and the courts in considering the imposition of punitive damages under a different discrimination statute.

In so doing, the court of appeals transgressed the principle set down in *Gasperini v. Center for Humanities, Inc., supra*, that although courts of appeals may pass on the excessiveness of damages awarded in lower courts, they may not themselves remit damages awards they deem excessive, and instead must remand to the district courts the matter of adjustment of damages. Moreover, the court of appeals' decision (as interpreted by the district court) disregards the explicit requirement of *Hetzel v. Prince William County, Va., supra*, that a plaintiff must be given the option of a new trial when a district court remits a damages award either on its own or after a court of appeals' determination that the jury's verdict was excessive. The court of appeals does not suggest why it should be excused from the rule of *Hetzel, supra*.

This Court long ago held that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). In two respects, the court of appeals' decision curtails petitioner's right to a jury trial: it deprives her of the jury's punitive award as determined in the trial which took place in December 1995, and it deprives her of a new trial to determine a proper replacement for the punitive award vacated on appeal as excessive. The court of appeals' actions here in re-examining *whether* any punitive damages award was warranted after the jury had come to a factually supported conclusion that for years respondents intentionally and willfully discriminated against her, and in refusing to grant petitioner a new trial on punitive damages, without any reference to directly conflicting, controlling interpretations of the Seventh

Amendment enunciated by this Court requiring such a new trial, call out for correction.

I. Although the Court of Appeals Framed Its Decision in Terms of the Verdict's Excessiveness, the Court's Holding in Effect Constitutes an Unconstitutional Reexamination of the Jury's Factually Supported Finding that Respondents' Intentional, Willful Discrimination Warranted the Deterrence and Punishment that Punitive Damages Represent

At trial, the jury expressly found that respondents *intentionally and willfully* discriminated against Dr. McMillan over the course of several years in setting her department head salary lower than the salaries of the male department heads and that as a result she suffered a substantial salary loss. App., *infra*, 64a. The court of appeals affirmed the jury's finding of intentional discrimination and its assessment of damages for lost salary. App., *infra*, 33a. (The willfulness finding under the federal Equal Pay Act was not challenged either in defendants' post-trial motions or on appeal.[8])

In vacating the jury's punitive damages award, the court of appeals explained that having found intentional discrimination, the jury next had to engage in "a second

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[8] The EPA damages were subsumed in the jury's larger damages award under Mass. G.L. c. 151B. App., *infra*, at 48a, n.2. The trial transcript recording the jury's finding of willfulness is at App., *infra*, 64a. The district court's instruction on the issue was: " 'willfully' means that the MSPCA paid Dr. McMillan less than she should have received knowing or having reason to know that the law requires employers to pay women and men the same salary or wage for equal work."

inquiry to determine whether defendants' intentional conduct was *egregious enough* for an award of punitive damages." App., *infra*, 32a (emphasis supplied). Although the court of appeals left the jury's factual finding of intentional and willful discrimination undisturbed, it then undertook to re-examine the jury's conclusions regarding whether the respondents' willful and intentional discrimination was "egregious enough for an award of punitive damages." In doing so, it committed an error of constitutional magnitude.

The Reexamination Clause of the Seventh Amendment prohibits federal courts' review of juries' factual findings regarding the proper amount of damages other than as permitted by ancient principles developed under the common law. Until very recently, this Court had been reluctant to approve any appellate review of the size of juries' verdicts at all. *See Gasperini, supra*, 518 U.S. at 434 ("appellate review of a federal court's denial of a motion to set aside a jury's verdict as excessive . . . was once deemed inconsonant with the Seventh Amendment Reexamination Clause"). Only in *Gasperini* did this Court finally approve such a review, but one limited to a review under abuse of discretion standards. *Id.* at 435-36.

Yet here, the court of appeals went beyond merely reviewing whether the district court abused its discretion in confirming the punitive damages award – a review that would have passed constitutional muster – to substitute its judgment for that of the jury regarding whether the intentional, willful discrimination the jury had found was "egregious enough" to warrant punitive damages. The court of appeals stated:

> It follows . . . that just as we may review the record to determine whether a reasonable jury could have found that the defendants intentionally discriminated against Dr. McMillan, we may also review the record to determine whether a reasonable jury could have found defendants' conduct sufficiently worthy of condemnation and deterrence to justify exemplary damages. App., *infra*, 32a-33a.

In effect, the court of appeals' self-described undertaking amounts to second-guessing the moral judgment of the jury, acting as the conscience of the community, regarding matters uniquely assigned to it. *See, e.g., BMW of North America v. Gore*, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting on other grounds) (" . . . punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved") (citations omitted).

To be sure, the court of appeals has the power to examine the legal sufficiency of a plaintiff's evidence.[9]

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[9] Theoretically, the court of appeals might have been correct in claiming the right to make a "second inquiry" into whether a respondent's conduct warranted exemplary damages had applicable law required a jury to find additional facts, beyond intentional discrimination, to underpin a punitive damages award. *See, e.g., Ngo v. Reno Hilton*, 140 F.3d 1299 (9th Cir. 1998) (requiring showing of willfulness or recklessness for award of punitive damages under Title VII, whereas showing of negligence would suffice to prove intentional discrimination). But the court of appeals did not posit any such requirement that additional facts be found, such as a showing of willfulness. Furthermore, even if some factual element had been found wanting, the procedural posture of this case would have required a remand for a new trial on punitive damages. *See* § II, *infra*. *See also* next footnote.

But legal insufficiency was not the basis for the court of appeals' ruling.[10] The court of appeals did not hold that the matter of punitive damages should not have been put to the jury. On the contrary, the court of appeals' decision makes clear that the court simply disagreed with the jury's judgment that respondents' willful and intentional discrimination warranted punitive damages. The sum total of its explanation of why punitive damages were not warranted is as follows:

> Determining what conduct rises to the level at which an award of punitive damages is appropriate is a difficult task, but the evidence shows that the actions at issue in this case do not . . . (App., *infra*, 33a).

That explanation constitutes a value judgment, which this Court has treated as a factual matter uniquely within the province of the jury, much like the determination of the appropriate monetary award for a plaintiff's emotional distress, as in *Hetzel, supra*. Factual matters may only be

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[10] Arguably, Massachusetts has adopted a heightened standard (requiring, as in *Ngo, supra*, a showing of willfulness as opposed to negligence) for punitive damages for violations of Mass. G.L.c. 151B, the statute here at issue. *See Dartt v. Browning-Ferris Industries*, 427 Mass. 1, 16-17, 691 N.E.2d 526, 536-37 (1998) (surmising that jury that had awarded punitive damages had perhaps relied on improperly admitted evidence that the employer knowingly violated the law, and that without a basis in that improperly admitted evidence, the question of punitive damages should not have gone to the jury). However, the court of appeals did not disapprove the punitive damages award on the basis that petitioner failed to meet this heightened standard. Nor could it have: by proving *willful* (*i.e.*, knowing) discrimination under the Equal Pay Act, petitioner had met the higher standard that might be held to apply.

reviewed under the schema set out in *Gasperini, supra*: under an abuse of discretion standard, with a possible remand for remittitur or new trial at the district court level if the court of appeals deems the first jury's award to have been excessive.

By undertaking to second-guess the jury's evaluation of the egregiousness of respondents' actions in its function as, in the words of Justice Scalia, the "voice of the community," the court of appeals encroached on an area reserved to the jury. The court of appeals thus went beyond any inquiry it was entitled to make under the Seventh Amendment, *i.e.*, regarding the sufficiency of the evidence or the excessiveness of the punitive damages award, and replaced the jury's judgment with its own. This Court should grant the writ to correct the court of appeals' unwarranted encroachment into areas uniquely within the jury's authority, and its consequent violation of petitioner's right to a jury trial.

a. Although It Utilized the Language of "Excessiveness", the Court of Appeals Did Not Conduct Such a Review

This Court has outlined a variety of considerations that reviewing courts should consider in assessing whether a particular award of punitive damages exceeds what is legally sustainable. *BMW of North America v. Gore, supra*. One would expect that were the court of appeals conducting a genuine review for excessiveness, those factors would be prominently measured against the underlying facts of the case. Yet the court of appeals did not so much as give passing mention to *BMW*. This is especially

troubling since the court of appeals recognized that the punitive damages award was governed by state law, and the Massachusetts Supreme Judicial Court has explicitly adopted the factors set out in this Court's majority and concurring opinions in *BMW*, *supra*. *See Labonte v. Hutchins & Wheeler*, 424 Mass. 813, 826-27, 678 N.E.2d 853, 862-63 (1997). That the court of appeals focused on entirely different questions makes clear that it never considered the question of excessiveness except as a variation on its actual holding – that although respondents had intentionally discriminated, no punitive damages at all were warranted.[11]

b. The Court Of Appeals' Actions Are Inconsistent with an "Abuse-of-Discretion" Review

A further indication that the court of appeals did not properly construe its role is the lack of explicit remand for a remittitur or new trial, which would be the proper consequence of a holding of excessive damages, as discussed *infra*. The absence of an explicit remand, along with the court of appeals' use of language which the district court read to foreclose consideration of punitive

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[11] Should the Court agree with the petitioner, the court of appeals should be instructed to reinstate the jury's punitive damages award. Then, and only then, should an "excessiveness" review be conducted. Should the court of appeals determine after a proper review that the punitive award was not excessive, the matter would be closed. In the event that the court of appeals were to conclude on remand that the award was in fact excessive, the matter would then have to be remanded further to the district court for remittitur or new trial, as discussed *infra*.

damages on remand, suggests that the court of appeals did not view its task as a mere review of whether the district court abused its discretion. This is especially so since this Court had recently made unquestionably clear in *Gasperini, supra,* that a remand for a remittitur or a new trial *must* follow a court of appeals' ruling that the district court abused its discretion in denying a party's new trial motion where damages were held to be excessive.

II. The Writ Should Be Granted to Enforce the Requirement that, Where a Court of Appeals Concludes that a Jury's Damages Award Was Excessive, the Matter Be Remanded to the District Court for Remittitur or a New Trial

The instant dispute arose as a consequence of respondents' post-trial motions under F.R.Civ.P. Rules 50 and 59. The district court denied the Rule 50 motion for judgment as a matter of law because respondents had failed to address the matter of punitive damages in their motion for a directed verdict, as discussed *supra.*[12] App., *infra,* 53a. The district court then denied the motion for a new trial on the merits. App., *infra,* 58a-59a. Thus, respondents' only viable challenge to the punitive damages award in the trial court was their motion for a new trial brought under F.R.Civ.P. Rule 59, and their only viable

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[12] Respondents did not appeal the district court's procedural ruling under Rule 50, and the court of appeals did not address it. The district court ruled correctly. *See Neely v. Eby Construction Co.,* 386 U.S. 317, 325 (1967) (" . . . an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b) . . . ").

challenge on appeal was to the district court's denial of their new trial motion.[13]

This Court has noted that the Reexamination Clause permits *trial* judges "large" authority to order new trials under Fed. Rule Civ. Proc. 59(a). *Gasperini, supra,* 518 U.S. at 433. By contrast, once the district court denies a Rule 59 new trial motion, courts of appeals are tightly constrained by the Seventh Amendment: " '[t]he court of appeals should then review the district court's determination under an abuse-of-discretion standard.' " *Id.* at 435 (citation omitted).

The appellate court's authority is thus severely circumscribed. This Court has made clear that the Seventh Amendment precludes a federal court of appeals from itself effecting a remittitur, and limits the circuit court's role to determining whether the district court abused its discretion in denying a motion for remittitur or a new trial. Should the court of appeals find such an abuse of discretion, it must remand the case for a new trial or remittitur. *Id.* at 438-39. *See also Hetzel v. Prince William County, Va., supra,* 118 S.Ct. at 1211-12 (court of appeals violated Seventh Amendment by ordering district court to enter judgment for a lesser amount than that determined by the jury without allowing plaintiff option of a new trial).

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[13] Likewise, respondents' only viable challenge to the jury's award for lost benefits arose under Rule 59, and their only viable challenge on appeal was to the district court's denial of their new trial motion on the benefits award. *See* App., *infra,* 53a, 58a.

The mandated procedure was not followed here.[14] Petitioner has sought a new trial from the district court but has been denied, on grounds that the court of appeals did not intend such a result. App., *infra*, 60a. As a consequence, the court of appeals' erroneous understanding of the Seventh Amendment's prohibition of federal courts' reexamination of juries' factual findings, and that court's flawed implementation of this Court's dictates in *Gasperini* and *Hetzel*, stand unremedied. This petition for a writ of certiorari should be granted to compel the court of appeals to obey the mandates of this Court and the Seventh Amendment.

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[14] The court of appeals committed a parallel error in ordering a remand for reduction of petitioner's back pay award by the amount of the jury's award for lost benefits. Respondents first objected to the district court's having permitted the jury to include in its back pay calculation an amount representing lost benefits in a post-trial motion under Rule 50, having neglected to raise the matter before the case was submitted to the jury. The district court dismissed the objection as having been untimely raised, a procedural ruling which respondents did not appeal. App., *infra*, 53a. The district court then rejected respondents' Rule 59 motion regarding benefits on the merits. App., *infra*, 58a. Nevertheless, the court of appeals accepted respondents' argument and ordered the district court to delete the twenty-one percent allowance for benefits from the award of back pay. App., *infra*, 29a-30a, 45a. In so doing, the court of appeals ignored the requirements of *Hetzel*, *supra*, and *Gasperini*, *supra*, that petitioner be granted a new trial regarding her lost benefits. Petitioner therefore asks this Court to rule that petitioner is entitled to a new trial on benefits, even if the punitive damages issue is resolved without the need for a remand for a remittitur or new trial on punitive damages, or is rendered moot by the court of appeals' grant of petitioner's pending petition for a writ of mandamus.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 12, 1998

APPENDICES

APPENDIX A

Dr. Marjorie C. McMILLAN,
Plaintiff, Appellee,

v.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, and Dr. Gus Thornton, Defendants, Appellants.

Dr. Marjorie C. McMILLAN,
Plaintiff, Appellant,

v.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, Dr. Gus Thornton and Dr. Paul Gambardella, Defendants, Appellees.

Nos. 97-1048, 97-1174.

United States Court of Appeals,
First Circuit.

Heard Oct. 7, 1997.

Decided March 18, 1998,

Order on Rehearing June 16, 1998.

Marcus E. Cohn with whom Melissa Bayer Tearney and Peabody & Brown, Boston, MA, were on brief for defendants.

Dahlia C. Rudavsky, Boston, MA, with whom James S. Weliky, Jamaica Plain, MA, and Messing & Rudavsky, P.C. were on brief for plaintiff.

Before STAHL, Circuit Judge, GODBOLD,* Senior Circuit Judge, and CYR, Senior Circuit Judge.

STAHL, Circuit Judge.

In the late 1980s, Dr. Marjorie McMillan, head of the radiology department for the Massachusetts Society for the Prevention of Cruelty to Animals ("MSPCA"), learned that she was being paid less than the male heads of the organization's other departments. Defendants MSPCA and Dr. Gus Thornton now appeal the district court's denial of their motion to set aside verdicts in Dr. McMillan's favor on her various pay discrimination claims. They also appeal as excessive the jury's award of compensatory and punitive damages, and the district court's award of attorney's fees. Dr. McMillan cross-appeals the court's grant of judgment as a matter of law on her tortious interference with contractual relations claim against defendant Dr. Paul Gambardella, and its grant of summary judgment on her contract claims against the MSPCA and on her retaliation claim against all three defendants. We affirm the district court's ruling on the pay discrimination, tortious interference, contract, and retaliation claims, and, in part, the jury's compensatory damages verdict; reverse the award of punitive damages and compensatory damages representing lost benefits; and vacate the award of attorney's fees with directions that it be recalculated after remand.

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* Of the Eleventh Circuit, sitting by designation.

I.

BACKGROUND AND PRIOR PROCEEDINGS

We begin with an overview of general facts and prior proceedings, and leave more detailed recitations to the appropriate contexts.

Defendant MSPCA is a charitable, non-profit organization that combats cruelty to animals through educational programs and veterinary services. It operates Angell Memorial Animal Hospital ("Angell"), whose staff, during the relevant time period, totalled more than 200 employees, including veterinarians, interns, residents in post-graduate veterinary training, and technical and support staff. Defendant Dr. Gus Thornton began working at Angell in 1957, and was its chief of staff from 1966 until 1989, at which time he became president of the MSPCA. Defendant Dr. Paul Gambardella worked as a staff surgeon at Angell from 1975 until 1984, and as the interim director of surgery from 1984 until 1989, when Dr. Thornton appointed him chief of staff.

Plaintiff Dr. Marjorie McMillan was first employed by Angell in 1969 and thereafter was employed in various capacities until she left in 1977 to work in private practice. She returned in 1981 as the director of the radiology department, employed part time. She left Angell again in 1984 to spend one year completing coursework necessary for board certification and returned to Angell in 1985, again as director of radiology on a part-time schedule. From 1987 until 1991, she worked full time as head of radiology. In addition, from 1981 to 1991, she worked approximately seven hours each week at Windhover Bird

Clinic ("Windhover"), a part-time private avian practice that she had established in Walpole, Massachusetts.

Until 1988, Angell had seven veterinary departments: clinics, cardiology, intensive care, clinical pathology, pathology, surgery, and radiology. All of the departments were headed by veterinarians, who, in addition to fulfilling their clinical duties, also served as administrative directors of their departments. During this time, Dr. Thornton was responsible for negotiating veterinarians' initial salaries and for setting discretionary annual increases from a fixed amount of funds. Although the department directors were responsible for such tasks as purchasing equipment, training interns and residents, scheduling, and making budget and compensation recommendations to Dr. Thornton, all of the staff reported to Dr. Thornton rather than to the individual directors.

In 1985 Dr. Thornton initiated a plan to restructure Angell's management, giving to the department directors greater responsibility, including the authority to make hiring, firing, compensation, and discipline decisions. As part of the reorganization, Dr. Thornton in 1988 consolidated Angell's seven departments into four departments: radiology, medicine, surgery, and pathology.

Dr. McMillan did not know the salaries of other veterinarians employed by Angell until 1987, when she learned that the salary of a newly-hired radiologist was $38,000. Dr. McMillan, whose salary at that time was $41,000, consulted Dr. Thornton and requested a raise so that her compensation would be comparable to that of the other department heads. Dr. Thornton eventually offered Dr. McMillan a raise to $47,000, which she did not accept

because she had been offered a $50,000 salary for a non-administrative veterinary position at Tufts University Veterinary School. Dr. Thornton then agreed to adjust Dr. McMillan's salary to $51,000, effective in January 1988.

In 1989, Dr. McMillan discovered the disparity between her salary and that of the other department heads at Angell when a newspaper published a letter about the MSPCA that listed the various salaries. At the time, her salary was $58,000; her male counterparts in surgery, pathology, and medicine, by contrast, were earning $73,000, $80,244, and $73,199, respectively. On the basis of the salary disparity, Dr. McMillan filed a complaint with the Massachusetts Commission Against Discrimination.

Also in 1989, Dr. Gambardella, who became chief of staff upon Dr. Thornton's accession to the MSPCA presidency, set out to reevaluate and to improve the level of department heads' compensation. He began by creating job descriptions for each of the department heads in which the list of duties for the head of radiology was substantially the same as those for the other department head positions. He also consulted a study of the salaries at another major animal hospital and an informal market survey, on the basis of which he tentatively suggested to Kathleen Collins, Angell's human resources director, that the heads of radiology and surgery receive $88,000, the head of medicine, $90,000, and the head of pathology, $95,000. Collins then undertook an analysis of the department head jobs in order to "rationalize" the MSPCA's salary structure, giving a range of points in a number of categories of responsibility. On the basis of the point totals, she determined an appropriate salary for each of

the department heads. On completion of the analysis, in 1990, Dr. McMillan received a raise from $58,295 to $72,000, which was substantially larger than that received by any of the other department heads.[1]

Also in 1990, Dr. McMillan entered into negotiations with Angell over the status of Windhover. Dr. McMillan suggested that Angell acquire her practice or, alternatively, that it rent her space so that she could carry on her bird practice there or that it pay her a separate, additional amount for her treatment of Angell's avian patients. When the negotiations came to an impasse, Dr. McMillan refused to continue to treat birds at Angell, a duty to which she had been devoting approximately six hours per week.

In 1991, Dr. Gambardella began to receive complaints from veterinarians – other department heads and members of the surgery staff, in particular – that Dr. McMillan was uncooperative and had created an atmosphere of animosity and inflexibility in the radiology department. On November 21, 1991, Dr. Gambardella summoned Dr. McMillan as she was preparing to perform a procedure on an anesthetized dog, fired her, gave her fifteen minutes to gather her belongings, and had her escorted out of the hospital. She was told not to return and was thereafter excluded from the premises. Although Angell had adopted in March 1990 a discipline policy directed at the

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[1] The heads of surgery and medicine received raises of $4,380 and $5,124, respectively. Although the head of pathology received a raise of approximately $15,000 in 1990, the evidence shows that this raise was the result not of the analysis, but of his demand that the MSPCA match a competing offer.

correction of inappropriate behavior and retention of employees whenever possible, Dr. McMillan was given no advance warning of her termination.

On May 21, 1992, Dr. McMillan sued the MSPCA, Dr. Thornton, and Dr. Gambardella, alleging pay discrimination in violation of Title VII, 42 U.S.C. § 2000e-1; the Equal Pay Act ("EPA"), 29 U.S.C. § 206; and the Massachusetts anti-discrimination statute, Mass. Gen. Laws ch. 151B, and Equal Rights Act, Mass. Gen. Laws ch. 93, § 102. The complaint also alleged retaliation in violation of Title VII, the EPA, and Mass. Gen. Laws ch. 151B and ch. 272, §§ 92A and 98; breach of contract and negligent performance of contractual duties against the MSPCA; and tortious interference with contractual relations against Dr. Thornton and Dr. Gambardella. On March 17, 1995, the district court awarded the MSPCA summary judgment on Dr. McMillan's claims for pay discrimination under Title VII and Mass. Gen. Laws ch. 93, § 102, retaliation under state and federal law, breach of contract and negligent performance of contractual duties, and tortious interference with contractual relations against Dr. Thornton. The court also held that damages against the MSPCA were limited to $20,000, pursuant to the Massachusetts charitable immunity law, Mass. Gen. Laws ch. 231, § 85K. The court later held that chapter 231 did not apply and granted Dr. McMillan's motion for reconsideration of the limitation on damages.

In December 1995, plaintiff tried to a jury the remaining counts: pay discrimination in violation of the EPA against the MSPCA and in violation of Mass. Gen. Laws ch. 151B against the MSPCA and Dr. Thornton, and tortious interference with contractual relations against Dr.

Gambardella. The jury found in her favor on all counts. On Dr. McMillan's pay discrimination claim under Mass. Gen. Laws ch. 151B, the jury awarded $183,784.50 as back pay accrued from 1985 through 1991, to which it added $178,915 for interest accrued from 1985. On her tortious interference claim against Dr. Gambardella, it awarded $197,550 as back pay, adding $84,846.50 as interest and $99,375.23 as front pay. Finally, the jury assessed punitive damages against Dr. Thornton and the MSPCA in the amount of $306,912.50. On November 12, 1996, the court awarded Dr. McMillan $447,928.81 in attorney's fees and $18,889 in costs. On the same day, the trial court set aside the jury verdict on the tortious interference claim against Dr. Gambardella but declined to set aside or grant a new trial on the pay discrimination verdict or award of back pay and punitive damages. This appeal and cross-appeal followed.

II.

DISCUSSION

A. Pay Discrimination

The MSPCA and Dr. Thornton contend that the trial court erred by denying their Fed.R.Civ.P. 50(b) motion for judgment as a matter of law, thereby ruling that there was sufficient evidence for a reasonable jury to find that they intentionally discriminated against Dr. McMillan, on the basis of her sex, in setting her salary between 1985 and 1991. They first argue that the evidence was insufficient

to show that Dr. McMillan's skills, efforts, and responsibilities as a radiologist and department head were substantially similar to those of the male department heads.[2] The remainder of their argument addresses the issue of pretext. Focusing on evidentiary questions, defendants contend that the trial court erred by admitting Dr. Gambardella's preliminary suggestions about appropriate department head salaries, and sporadic comments derogatory to women made by Dr. Thornton, as evidence that the reasons provided by Dr. Thornton for the pay disparity were pretextual. They further assert that there was insufficient evidence that Dr. Thornton's stated reasons for his determinations of base salaries and annual salary increases were pretextual. Specifically, they contend that a statistical analysis used to show pay differentials between males and females at the MSPCA could not

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[2] As a sub-argument, defendants argue that the district court erred by failing to instruct the jury that it must evaluate the dual role of each department head in comparing jobs of the department heads. This error, they contend, had the effect of relieving Dr. McMillan of her obligation to prove that her role as a radiologist – in addition to her role as department head – was substantially equivalent to the medical, as opposed to administrative, roles of each of her male counterparts. We summarily reject this contention because the court clearly instructed the jury that it should evaluate the actual duties of each of the department heads and that those duties "may have differed in some respects." And in any event, the jury could not have compared the jobs of the department heads without considering the skill, effort, and responsibility required by their individual specialties. Thus, the instruction was well within the court's discretion. *See Davet v. Maccarone*, 973 F.2d 22, 28 (1st Cir.1992) (holding that an error in jury instructions is harmless if it did not affect the substantial rights of the parties).

support the verdict, and that Dr. Thornton's "stray remarks" were insufficient to expose as pretextual his purported method of establishing and raising salaries.[3]

Defendants challenge the pay discrimination verdicts under both state and federal discrimination law. To establish a prima facie case of sex discrimination based on salary disparity under the federal Equal Pay Act, a plaintiff must show that her employer was subject to the Act, and that she was paid less than her male counterparts who were performing work requiring substantially equal skill, effort, and responsibility under similar working conditions. Defendants must then prove by a preponderance of the evidence that the pay disparity can be explained by a legitimate factor such as seniority or performance. *See Corning Glass Works v. Brennan,* 417 U.S. 188, 195-96, 94 S.Ct. 2223, 2228-29, 41 L.Ed.2d 1 (1974); *Timmer v. Michigan Dep't of Commerce,* 104 F.3d 833, 843 (6th Cir.1997). Thus, in cases brought under the Equal Pay Act, the plaintiff need not show that the defendant was motivated by a discriminatory animus, as required in cases governed by the *McDonnell-Burdine* burden shifting framework.

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[3] Relatedly, defendants assert that the district court's denial of their motion for a judgment as a matter of law was based on a misapplication of the law. They argue that the standard the court used was whether the jury disbelieved Dr. Thornton's testimony regarding how he set salaries, not whether plaintiff presented sufficient evidence to show that the stated procedures were pretextual. Because we review *de novo* a motion for judgment as a matter of law and can affirm on any independent basis that appears in the record, *see Mesnick v. General Elec. Co.,* 950 F.2d 816, 822 (1st Cir.1991), we need not pass on the district court's rationale.

Under Massachusetts law, after a plaintiff presents her prima facie case, the requirements of which are the same as under federal law, *see, e.g., Petsch-Schmid v. Boston Edison Co.*, 914 F.Supp. 697, 706-07 (D.Mass.1996), there is a rebuttable presumption of intentional discrimination, *see Blare v. Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 441, 646 N.E.2d 111 (1995). The defendant then has the burden of producing evidence of a legitimate, non-discriminatory reason for the pay disparity. *See id.* at 441-42, 646 N.E.2d 111. After the defendant has satisfied this burden, the presumption of intentional discrimination disappears, *see id.* at 442, 646 N.E.2d 111, and plaintiff assumes the burden of proving, by a preponderance of the evidence, that the defendant's stated reasons for the pay disparity were not the real reasons, *see id.* at 444-45, 646 N.E.2d 111.[4]

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[4] Defendants contend that a recent Massachusetts case, *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 686 N.E.2d 1303 (1997), has modified the standard of analysis set forth in *Blare*. In particular, they cite a statement in *Matthews* that a plaintiff must "produce evidence sufficient to support a jury verdict that it was more likely than not that the articulated reason was pretext for actual discrimination," *id.* at 128, 686 N.E.2d 1303, to argue that Massachusetts has adopted the more onerous "pretext plus" standard for proving discrimination. Under such a standard, a plaintiff must prove not only that an employer's stated reason for the employment decision at issue was pretextual but also that it was a pretext *for discrimination*. This argument is meritless. The language that leads defendants to conclude that Massachusetts has adopted a new standard is taken directly from *Blare*, 419 Mass. at 447, 646 N.E.2d 111, the case which states explicitly that Massachusetts is a "pretext only" jurisdiction, *see id.* at 443, 646 N.E.2d 111. Whatever ambiguities may be contained in *Blare's* language, we will not ignore the explicit rejection in that case of the "pretext plus" standard.

We review *de nono* a trial court's decision to deny or to grant a defendant's motion for judgment as a matter of law. *See Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429, 436 (1st Cir.1997). The standard of review for motions for judgment as a matter of law requires us to view the evidence "in the light most favorable to the nonmoving party, drawing all reasonable inferences in its favor." *Id.* We will not set aside a jury verdict as a matter of law unless there was only one conclusion the jury could have reached. *See Conway v. Electro Switch Corp.*, 825 F.2d 593, 598 (1st Cir.1987).

1. Prima Facie Case

We agree with the district court that a reasonable jury could have found that Dr. McMillan had satisfied her burden of establishing a prima facie case of pay discrimination. Contrary to defendants' assertion that plaintiff failed to offer evidence comparing the skill, effort, and responsibilities of her position as radiology department head with that of the other department heads, plaintiff proffered testimony that the radiology department is comparable with the other departments in all three respects. In particular, testimony from Dr. Neil Harpster, Angell's cardiology department head from 1985 to 1988, and Dr. Allen Sisson, a staff veterinarian, provided evidence both that the procedures performed by Dr. McMillan in her job were among the most technically difficult procedures performed by any veterinarian at Angell and that the hours Dr. McMillan spent at her job were comparable to those of the other department heads. In addition, the evidence showed that Dr. McMillan

supervised more staff than did Dr. James Carpenter, the head of the pathology department, and that, in Kathleen Collins's analysis of department head jobs in the late 1980s, radiology was ranked equally with pathology and medicine in seven out of eight categories of responsibility.[5] Moreover, although the job descriptions that Dr. Gambardella formulated in 1989, without more, are not dispositive, the fact that the job requirements for all of the department heads were substantially the same is supportive of other evidence that the department head positions required substantially equal skill, effort, and responsibility. Finally, a market survey published sometime in the first half of the 1980s and admitted into evidence demonstrated that the average salaries of radiologists were comparable to those of other specialists, indicating that radiology is not an intrinsically less

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[5] Defendants argue that, although the radiology department received 97 percent of the points that the surgery department received in Collins's analysis of department head responsibilities, such a statistic elevates form over substance because the salary chart provided ranges within each salary grade which gave managers a "significant degree of flexibility" in setting pay. The ranges, they note, would have permitted Dr. Gambardella to pay the radiology department head over $35,000 less than the department head of surgery and over $40,000 less than the department heads of medicine and pathology. We note, however, that, even if the new pay system left Dr. Gambardella with a considerable degree of discretion in setting salaries, the analysis was not meaningless and, indeed, established a salary grade for radiology that was only one grade behind surgery and two grades behind pathology and medicine. That there was a range of salaries within each grade is to be expected, and the jury reasonably may have found important that an evaluation of responsibilities of the various departments resulted in so little variation in salary grades.

demanding area of veterinary medicine. The evidence was thus sufficient to support a finding that plaintiff had presented a prima facie case.

2. Pretext

We turn next to the issue of pretext.[6] At trial, defendants presented several reasons to explain why Dr. McMillan was paid less than the other department heads. Dr. Thornton testified that, as chief of staff, he set a department head's compensation by conducting an informal survey of what similarly situated veterinarians were being paid at other institutions and by negotiating compensation with the prospective department head. He stated that, in general, radiologists commanded lower compensation than did veterinarians in other specialties. He further testified that, to determine yearly percentage salary increases, he evaluated each department head's productivity and responsibilities. Dr. Thornton stated that, in his view, the head of medicine, Dr. Michael Bernstein, had significantly more responsibilities, including the oversight of more staff, than did Dr. McMillan as head of radiology. Dr. Thornton likewise claimed that the head of pathology, Dr. Carpenter, had more responsibilities than did Dr. McMillan because he supervised more staff, had a larger budget, and was nationally

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[6] We concentrate on Massachusetts law because, if plaintiff meets the burden it establishes – that is, if she is able to show that defendants' proffered reasons for the pay disparity were pretextual – then she necessarily has satisfied the requirements of the federal Equal Pay Act, which places the ultimate burden on defendants.

known, and because pathology, unlike radiology, incorporated several disciplines such as clinical and anatomic pathology. The head of surgery, Dr. Gambardella at the time, merited greater compensation in Dr. Thornton's view because he was accountable for the budget and staff hiring and discipline for the department, supervised more staff, and had significant responsibility for patient care and client contact.

Defendants make two primary arguments regarding the pretext prong of plaintiff's pay discrimination claim. First, they argue that the jury's findings that Dr. Thornton's explanations were pretextual are tainted because the district court improperly admitted into evidence (1) Dr. Gambardella's preliminary suggestions in 1989 regarding salary increases as proof of Dr. Thornton's state of mind throughout the time period that he set Dr. McMillan's salary and yearly increases, and (2) evidence of sporadic distasteful remarks that Dr. Thornton made to women colleagues in 1979 and 1989. Second, defendants assert, in essence, that, even taking into account all of the evidence actually admitted, plaintiff failed to prove, as required under Massachusetts law, that Dr. Thornton's stated procedures for setting salaries were pretextual.

We review a district court's evidentiary rulings for abuse of discretion. *See United States v. Young*, 105 F.3d 1, 8 (1st Cir.1997). A judge should not exclude relevant evidence, unless its probative value is substantially outweighed by the danger of unfair prejudice. *See* Fed.R.Evid. 403. "Only rarely – and in extraordinarily compelling circumstances – will we, from the vista of a cold appellate record, reverse a district court's on-the-

spot judgment concerning the relative weighing of probative value and unfair effect." *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1340 (1st Cir.1988).

The court's admission of testimony about Dr. Gambardella's 1989 suggestions regarding salary increases was not an abuse of its discretion. One of Dr. Thornton's stated reasons for setting salaries at Angell as he did during the period from 1985 to 1989 was that radiologists commanded lower salaries on the market than did veterinarians in other specialties. The issue was whether this reason was pretextual. The informal 1989 survey on which Dr. Gambardella based his suggestions showed relative parity among salaries of radiologists and other specialists. Accordingly, Dr. Gambardella's suggestions were probative of whether radiology is intrinsically a less-valued veterinary specialty and, therefore, of whether Dr. Thornton's stated reason was, in fact, the *real* reason. They are probative also of Dr. Thornton's credibility because they were based on what veterinarians in various specialties were worth in the market, the very factor on which Dr. Thornton purported to rely in setting salaries at Angell. Further, although defendants contend that, regardless of the status of radiology at other institutions, the radiology department *at Angell* was not equal to Angell's other departments with regard to the responsibilities required of its head, we think that the district court did not abuse its discretion in determining that Dr. Gambardella's testimony regarding salary parity at other institutions was not unfairly prejudicial to defendants in their attempt to make this point.

Whether the court's admission into evidence of the so-called stray remarks was proper presents a more

difficult question. There is, of course, no question that Dr. Thornton's motivation in paying Dr. McMillan less than the other department heads was a material issue in the case. We note initially that stray remarks may properly constitute evidence of discriminatory intent for the jury to consider in combination with other evidence. *See Bevan v. Honeywell, Inc.*, 118 F.3d 603, 610 (8th Cir.1997); *O'Connor v. DePaul Univ.*, 123 F.3d 665, 671-72 (7th Cir.1997) (" '[S]tray remarks' – made by the decisionmaker but not related to the disputed employment action – may be relevant to the question of pretext. . . . "). Yet even if the remarks are relevant for the pretext inquiry, their probativeness is circumscribed if they were made in a situation temporally remote from the date of the employment decision, *see Armbruster v. Unisys Corp.*, 32 F.3d 768, 779 (3d Cir.1994), or if they were not related to the employment decision in question or were made by nondecisionmakers, *see, e.g., Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir.1992) ("Stray remarks by nondecisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight. . . . ").

The allegations in this case are that, during his time at Angell, Dr. Thornton made various unprofessional remarks to women with whom he worked. In 1979 or 1980, he talked to a lab technician about warming up a vial of medicine in her brassiere. Approximately ten years later, he made a remark to the MSPCA's lobbyist about her cleavage and then later asked whether, to stop bad publicity about the MSPCA by a particular reporter, she had slept with the reporter. Arguably, at least, these remarks may have been relevant and probative as to Dr. Thornton's motivation in setting the salaries of male and

female department heads, in the sense that they evince a derogatory attitude toward women.

However, not only did the remarks not involve the employment decision at issue, they did not involve employment at all. Further, at least one of the remarks was made several years before any dispute arose over the pay disparity between Dr. McMillan and other department heads. Such factors heighten the remoteness of the remarks, arguably to the point at which they are no more probative than they are prejudicial. Nonetheless, the question we must address in determining admissibility is not whether we agree with the district court but, rather, whether the district court abused its discretion. *See Espeaignnette v. Gene Tierney Co., Inc.*, 43 F.3d 1, 8 (1st Cir.1994). We think that it did not. Although the comments were unrelated to Dr. McMillan's situation, and although the remarks may, in the end, have fallen on the other side of the imprecise nexus/no-nexus boundary, the court's determination to admit the remarks for the jury to consider with the other evidence was not so one-sided such that it did not act within its discretion.[7]

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[7] This case can be distinguished from *Tardanico v. Aetna Life & Cas. Co.*, 41 Mass.App.Ct. 443, 450, 671 N.E.2d 510 (1996), cited by defendants, in which the decisionmaker's comments that plaintiff "had been around for a long time," and that his work equipment might have been "getting too heavy" for him were found to be too ambiguous to create an inference of discrimination because they were open to an interpretation that did not implicate age. In that case, the comments were insufficient to establish a genuine issue of fact and to thereby preclude summary judgment. Here, by contrast, the evidentiary question is not one of weight but one of admissibility. Our determination is whether the court below abused its discretion

Defendants contend in addition that the district court erred by giving the jury an improper instruction on the relevance of Dr. Thornton's remarks.[8] They assert that the court both analyzed and added to the evidence by equating Dr. Thornton's remarks with his attitude about the value of women when no evidentiary foundation supplied the nexus. Further, they argue that the instruction misled the jury to believe that stray remarks alone were sufficient evidence of pretext.

Defendants' objections to the jury instructions were not clearly articulated at trial and, therefore, not properly

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in concluding that the jury should be able to consider them, along with other evidence, in determining pretext.

[8] The district court's jury instruction as to Dr. Thornton's remarks was as follows:

> Take, as an example, an issue in this case that might be relevant to the issue of intent: You heard that Dr. Thornton made one or more remarks that might have been construed as derogatory to women. If you believe that he did so, you might conclude that such remarks reflected a personal attitude on his part about the value of women generally or you might conclude that the remark was random and completely out of character.
>
> If you believe the former, you might decide that a given remark is evidence of a discriminatory mindset and infer from it that Dr. Thornton's decisions regarding Dr. McMillan's salary were influenced by discriminatory intent. If you believe the latter, the remark would have no value as evidence of Dr. Thornton's motivations and you would disregard it in reaching a verdict.

preserved.[9] In such a situation, we review only for error resulting in a "clear miscarriage of justice." *Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066, 1069 (1st Cir.1990).

In reviewing jury instructions such as these, we focus principally on "whether they tended to confuse or mislead the jury on the controlling issues." *Service Merchandise Co., Inc. v. Boyd Corp.*, 722 F.2d 945, 950 (1st Cir.1983). In this instance, we discern no problems with the judge's stray remarks instructions. First, contrary to defendants' suggestion, federal judges may comment on the evidence. *See Leshore v. County of Worcester*, 945 F.2d 471, 474 (1st Cir.1991). Second, in this case the judge merely made explicit what the jury might infer if it chose to credit the stray remarks. This may be, as defendants assert, "connect[ing] the dots," but it is not a suggestion that a particular conclusion must be reached. Moreover, the court made clear to the jury that it was equally plausible to regard the remarks as "random and completely out of character," and thus to infer nothing at all about them.

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[9] Following the district court's jury instructions, defendants' counsel stated only that "when you talked about circumstantial evidence and stray remarks, it is difficult for me to see how this applies to a salary set by negotiation or a salary set by market factors." Because defendants failed "to object clearly and specifically to the district court's instructions before the jury retired to consider its verdict," *Morris v. Travisono*, 528 F.2d 856, 859 (1st Cir.1976), their statement does not amount to an objection. *See* Fed.R.Civ.P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.").

Likewise, the instructions in no way misled the jury to believe that the stray remarks might, alone, be sufficient to prove that defendants' stated reasons for paying Dr. McMillan less were mere pretext. That the jury "might decide that a given remark is evidence of a discriminatory mindset" seems to us to be nothing other than a restatement of why such evidence is presented to the jury in the first place; it implies nothing about how much or how little of such evidence is sufficient for the jury to find in the plaintiff's favor. In any event, the instructions did not result in a "clear miscarriage of justice."

As to the sufficiency of the evidence of pretext, defendants attack the analysis of plaintiff's statistical expert, Dr. Arlene Ash. They argue that the analysis cannot support the jury verdict because it did not incorporate variables that Dr. Thornton argued he applied when he set initial salaries and determined annual incremental increases. They also contend that it was based on a legally insufficient sample size.

We turn first to the argument that Dr. Ash's analysis ignored important factors. Defendants assert that Dr. Ash's model should have included such variables as market factors, negotiations, veterinary experience, performance evaluations, productivity, and veterinarians' overall contribution to the hospital. As a preliminary matter we note that, although a failure to include particular variables in a regression analysis may diminish the probativeness of the analysis, "it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors . . . 'must be considered unacceptable as evidence of discrimination.' " *See Bazemore v. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 3009,

92 L.Ed.2d 315 (1986). Dr. Ash incorporated into the analysis such legitimate variables as veterinarians' seniority at Angell, department head status, board-approved specialization, area of specialization, and departmental budget size. Although the models she developed may not have included every relevant variable, her testimony shows solid reasoning in her determinations to exclude certain variables that the defendants argued should have been included. We therefore reject this argument.

Defendants further assert that Dr. Ash's analysis was effectively based on an insufficient sample size because Dr. Ash used factors which could apply only to department heads. This objection is opaque and unpersuasive. Dr. Ash's choice of sample, which was the approximately forty-six veterinarians who worked at Angell from 1981 to 1991, was not fatally deficient. The analysis made a distinction between those veterinarians who were department heads and those who were not. Only one variable – budget size – was specific to department head status, and it was not applied to the veterinarians who were not department heads.

Defendants continue, however, arguing that statistical evidence "should rarely be accorded *any* weight" in disparate treatment cases. We agree that in a disparate treatment case, such as this one, the necessary focus on the treatment of a particular individual appears incongruous with an analysis that necessarily involves numerous individuals and that, therefore, is intuitively more probative in the disparate impact context. *See LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 848 (1st Cir.1993); *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 156 (1st

Cir.1990). Nonetheless, such analyses are admissible even in disparate treatment cases unless they are "so incomplete as to be inadmissible as irrelevant."[10] *See Bazemore*, 478 U.S. at 400 n. 10, 106 S.Ct. at 3009 n. 10. Further, we have held that "[s]tatistical evidence is permissible on the issue of pretext in a disparate treatment case since 'statistics as to . . . employment policy and practice may be helpful to a determination of whether [the employer's conduct] conformed to a general pattern of discrimination.' " *Freeman*, 865 F.2d at 1342 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805, 93 S.Ct. 1817, 1825-26, 36 L.Ed.2d 668 (1973)). We agree with the court below that, in a case such as this, "the jury could have found a plausible connection between Dr. Thornton's

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[10] Defendants rely on *LeBlanc* to support their argument that statistical analyses are inappropriate for disparate treatment cases. We note, however, that *LeBlanc* held that "statistics alone" were not likely to be probative of whether the employer's decision to terminate plaintiff was based impermissibly on plaintiff's age. The court granted summary judgment to the employer because the statistics were "precariously unsupported by other probative evidence of age discrimination." *LeBlanc*, 6 F.3d at 848. In this case, by contrast, the statistics do not stand precariously alone; they were properly presented as evidence in the course of a trial with ample opportunity for cross-examination. Defendants also cite *Proud v. Stone*, 945 F.2d 796 (4th Cir.1991), to argue that, because Dr. Ash's analysis showed that Dr. McMillan was actually overpaid during her time at Angell from 1981 to 1983, "a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." 945 F.2d at 797. We respond that this issue was solely within the province of the jury. Although the jury was free to place credence in evidence of overpayments, it certainly was not compelled to.

treatment of women generally at Angell and his treatment of Dr. McMillan in particular."

Leaving aside whether Dr. Ash's analysis was watertight in all respects, we think it important to note that Dr. Ash's testimony was focused, perceptive, and understandably compelling to the jury. Reviewing the record, it is apparent to us that, whatever "infirmities" existed in her analysis, none was so substantive that no reasonable jury could have relied on it, along with the other evidence, in reaching a verdict. Rather, if Dr. Ash's analysis omitted what defendants argue are important variables, or was deficient in other respects, and thereby did not reflect whether Dr. Thornton's salary decisions were based at least in part on gender, it was up to defendants to exploit and discredit the analysis during cross examination. Furthermore, although the conflicting expert testimony they provided placed Dr. Ash's analysis into question, the jury was free to disregard that testimony and place credence in that of Dr. Ash. Indeed, as the district court noted, although the defendants' expert, Dr. Herbert Weisberg, disputed Dr. Ash's finding of a pattern of discrimination, he admitted that her model had produced statistically significant results.[11]

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[11] In addition, the cases that defendants rely on do not modify our analysis because they stand for the proposition that we will defer to the fact finder's decision. *E.E.O.C. v. Sears Roebuck & Co.*, 839 F.2d 302, 324-27 (7th Cir.1988), in which the Seventh Circuit affirmed the district court's determinations, thus can be distinguished from the case before us because, there, the circuit court was reviewing for clear error a district court's finding that the proffered statistical analysis was insufficiently persuasive. On review of the case, the circuit court observed

In arguing that plaintiff did not show evidence of pretext, Defendants' position seems to be that, aside from evidence of Dr. Thornton's stray remarks and Dr. Ash's statistical analysis, there remains no basis on which the jury might reasonably have found pretext under Massachusetts law and pay discrimination under the EPA. But in addition to the statistical analysis, plaintiff offered other evidence, which, in combination with the statistical evidence, was sufficient to support a finding of pretext. Although defendants posited that the radiology department was smaller than the other departments, plaintiff presented evidence that, in fact, cardiology was the smallest department, with only two employees under the supervision of the department head. The record reveals that the issue of seniority provided an additional basis for a jury finding of pretext. Dr. Thornton testified that both

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that, with regard to statistical evidence, "great deference is due the district court's determination of whether the resultant numbers are sufficiently probative of the ultimate fact in issue." *Id.* at 310. Moreover, in that case, unlike here, there was no victim testimony, and the analysis was the only evidence of discrimination before the court. *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676 (4th Cir.1996), supports our analysis because the court there held that whether a statistical model demonstrated a pay imbalance was a question of fact, thus precluding summary judgment as a matter of law. *Coser v. Moore*, 739 F.2d 746, 753-54 (2d Cir.1984), also an affirmance of the dismissal of the plaintiff's claim, likewise does not speak to this case, not only because the district court's rejection of the statistical analysis was reviewed under a clearly erroneous standard, but also because, in that case, salaries had been determined through a decentralized process, and the analysis was the only evidence plaintiffs proffered to show a pattern of discrimination.

the number of years a veterinarian had been in practice and his or her seniority at Angell were factors he weighed in setting initial salaries for a particular position. And, indeed, it appears from the evidence that he did consider seniority in setting the salaries of Dr. Gambardella when he became head of surgery and of Dr. Michael Aronsohn when he succeeded Dr. Gambardella in that position. Dr. Thornton's testimony indicates, however, that he ignored seniority and years in practice in the case of Dr. McMillan, treating her as a new hire when she returned to Angell in 1985.[12] The testimony shows that, even though Dr. McMillan in 1985 had spent two and a half years as radiology department director (albeit part time) and five years at Angell in various capacities, Dr. Thornton did not consider that experience in setting her salary. Rather, he testified that he based her salary on a survey that recommended $29,000 to $50,000 for the *least* experienced radiologists, and that, in fact, he paid her $35,000 simply because he could. But $35,000 was essentially the same salary Dr. McMillan had been earning in 1983, before she spent a year away from Angell.[13] As for

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[12] As plaintiff's counsel pointed out in her closing argument, setting Dr. McMillan's salary as though she were a new hire in 1985 contradicts defendants' expert's interpretation of Dr. McMillan's status in that year. In his evaluation of Dr. Ash's statistical analysis, Dr. Weisberg conducted an analysis in which he chose to look at the salaries of new hires only and thus excluded Dr. McMillan's 1985 salary from the analysis.

[13] The salary that she had been earning in 1984 before she left for a year, $34,668, had been prorated to $24,268 to account for her part-time schedule. Likewise, when she returned in 1985, her salary of $35,000 was prorated to $31,500 for the same reason.

annual percentage increases of salaries, although Dr. Thornton testified that he based his decisions on subjective factors such as productivity, contribution to the hospital, and interaction with other employees, he also testified that he did not systematically quantify contributions and interaction and that he did not evaluate the radiology department on the basis of productivity. Finally, testimony from Dr. Bernstein and Dr. Aronsohn placed into question Dr. Thornton's assertion that some department heads were so-called "strong department heads," and had more authority on that basis. Thus, a reasonable jury could have found that Dr. Thornton's stated reason for his salary decisions was not true or, in other words, pretextual.

Accordingly, because we think that there was sufficient properly admitted evidence for a jury to find that Dr. Thornton's stated reasons for the pay disparity were pretextual, we choose not to disturb the district court's denial of judgment as a matter of law with regard to the pay discrimination claims based on Mass. Gen. Laws ch. 151B and on the Equal Pay Act.[14]

B. Damages

Defendants present a variety of arguments regarding calculation of damages, most of which need not detain us long. At the outset, we note that we do not disturb a

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[14] By holding that plaintiff has introduced sufficient evidence for the jury to find pretext, we implicitly hold that the jury's rejection of defendants' proffered justification under the EPA is sustainable.

jury's award of damages unless it "exceed[s] any rational appraisal or estimate" of what the damages should be. *Kolb v. Goldring, Inc.*, 694 F.2d 869, 871 (1st Cir.1982) (internal citation omitted).

Defendants argue that Dr. McMillan's back pay damages award should be set aside or reduced because the award was excessive and unsupported by the evidence. They contend that the jury's award of back pay based on an average of the salaries of the male department heads between 1985 and 1991 has no legal basis. We disagree. As Dr. McMillan rightly points out, the cases defendants rely on to support their argument, *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 954 (1st Cir.1995) and *E.E.O.C. v. Liggett & Myers, Inc.*, 690 F.2d 1072, 1075 (4th Cir.1982), are inapplicable in this situation, and, if anything, serve to support rather than to discredit the averaging method. In *Liggett & Myers*, the court rejected a calculation of back pay based on the average salary in favor of a calculation based on the salary of the highest paid employee comparator. *See* 690 F.2d at 1074. Although *Scarfo* holds that back pay should be calculated by comparing the plaintiff's salary to that of "arguably equivalent" employees, it in no way indicates that averaging the salaries of two or more such employees is inappropriate. *See* 54 F.3d at 954. Here, averaging the salaries of the male department heads was a rational approach. In fact, in this context, a more appropriate method has not been proposed. We thus find that the method the jury apparently used to determine the amount of the back pay award was not inappropriate.

Defendants next assert that Dr. McMillan is not entitled to recovery, as part of her back pay award, for "lost

benefits" – health insurance, life insurance, and retirement contributions – because she did not prove that she had lost them. Plaintiff testified that she had been told that such benefits constituted twenty-one percent of an employee's salary and that, in her capacity as department head, she budgeted twenty-one percent of her supervisees' salaries as benefits. On this basis, the jury awarded Dr. McMillan an additional twenty-one percent of her back pay award to represent the value of the lost benefits.

Lost benefits are recoverable only if the plaintiff has offered evidence of out-of-pocket expenses for the same benefits. *See Kossman v. Calumet County*, 800 F.2d 697, 703-04 (7th Cir.1986) (holding that, to recover damages representing benefits, a plaintiff must show that she actually incurred insurance or medical care expenses); *Taylor v. Central Pa. Drug & Alcohol Servs. Corp.*, 890 F.Supp. 360, 372 (M.D.Pa.1995); *Berndt v. Kaiser Aluminum & Chem. Sales, Inc.*, 604 F.Supp. 962, 965 (E.D.Pa.1985). In this case, even if the budgeted value of benefits corresponding to plaintiff's salary had been less than the budgeted value of benefits corresponding to the salaries of the other department heads, plaintiff presented no evidence that she incurred insurance expenses. In addition, she presented no evidence that any employer-contributed retirement benefits were tied to the amount of her salary. Further, that benefits may have amounted to twenty-one percent of her supervisees' salaries does not mean that benefits constituted an equal percentage of higher salaries. Indeed, it would be logical to expect that employer insurance contributions at all salary levels were substantially the same and that, therefore, benefits were a considerably

lower percentage of higher salaries. Because there was no competent evidence from which a reasonable jury could conclude that Dr. McMillan suffered any loss in benefits as a result of her lower salary, Dr. McMillan's back pay award should be accordingly reduced by the amount of the lost benefits award.

Defendants' third argument is that we should import the three-year cap on back pay liability under the EPA, *see* 29 U.S.C. § 255, to Dr. McMillan's state back pay award under chapter 151B. This argument is without merit. No court decisions impose such a cap under Massachusetts law, and defendants present no rationale as to why state law should be the same as federal law. Further, Mass. Gen. Laws ch. 151B, as interpreted by the Supreme Judicial Court of Massachusetts ("SJC"), mandates "make-whole relief," which encompasses damages which are "the natural and probable consequences of the illegal conduct." *Conway v. Electro Switch Corp.*, 402 Mass. 385, 388, 523 N.E.2d 255 (1988) (internal citation omitted). Indeed, the SJC has declined to follow federal precedent in order to interpret chapter 151B more liberally than the federal courts have interpreted parallel federal law provisions. *See Lynn Teachers Union, Local 1037 v. Massachusetts Comm'n Against Discrimination*, 406 Mass. 515, 521 n. 7, 549 N.E.2d 97 (1990). We thus decline to adopt defendants' suggestion.

Fourth, defendants contend that Dr. McMillan's punitive damages award against the MSPCA on her pay discrimination claim should be set aside, or, alternatively, that a new trial should be granted on the issue. They challenge the punitive damages award on the basis that it was unwarranted, excessive, and obtained as a result of

irrelevant testimony about Dr. Gambardella's termination of Dr. McMillan. We agree with defendants that the award was unwarranted and excessive.

In a lawsuit such as this one, in which state law provides the basis of decision, "the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." *Browning-Ferris Ind. v. Kelco Disposal*, 492 U.S. 257, 278, 109 S.Ct. 2909, 2921, 106 L.Ed.2d 219 (1989). In reviewing an award of punitive damages, our role is to determine whether the district court abused its discretion in determining that the jury's award of punitive damages was within the confines of state law and that defendants are not entitled to a new trial or remittitur. *See id.* at 279, 109 S.Ct. at 2922. Although juries have wide discretion in determining the amount of punitive damages, and the trial court has broad discretion to affirm the jury's award of damages, *see Fishman v. Clancy*, 763 F.2d 485, 489-90 (1st Cir.1985), appeals courts should reduce or set aside awards that are "grossly excessive" or "shocking to the conscience," *id.* at 489 (citing *LaForest v. Autoridad de Las Fuentes Fluviales de P.R.*, 536 F.2d 443, 447 (1st Cir.1976)).

The jury in this case assessed punitive damages under chapter 151B against the MSPCA in the amount of $135,662.50 and against Dr. Thornton in the amount of $171,250. Although the statute authorizes punitive damages, *see* Mass. Gen. Laws ch. 151B, § 9, it does not specify when they should be awarded. However, other punitive damages provisions in Massachusetts law provide that such damages shall apply only on a finding that defendants' conduct was wilful, wanton, or reckless, *see, e.g.*,

Mass. Gen. Laws ch. 229, § 2, and the SJC has further refined the criteria, holding that punitive damages are warranted "where a defendant's conduct warrants condemnation and deterrence," *Bain v. City of Springfield*, 424 Mass. 758, 767, 678 N.E.2d 155 (1997).

Dr. McMillan contends that, because the jury found intentional discrimination, she was eligible for an award of punitive damages if the jury so decided in its discretion. We observe, however, that nowhere does Massachusetts law state that a finding of intentional discrimination necessarily justifies an award of punitive damages. This accords with the logic that, even in situations involving intentional misconduct, compensatory damages may provide sufficient punishment and deterrence.

The district court's jury instructions on punitive damages were that the jury could award punitive damages if it found defendants' conduct to have been "egregious and beyond the pale of tolerable," and that such damages are "intended to punish the defendants as a warning, both to them and other like-minded individuals, that society will not tolerate grievous discriminatory behavior." The district judge further stated that "[a]ny sum you award as punitive damages should be commensurate with your own conscience, the outrageousness of the conduct that you intend to punish, and the character of the MSPCA as both an employer and as a nonprofit enterprise." As these instructions imply, above the inquiry for finding intent, the jury had to conduct a second inquiry to determine whether defendants' intentional conduct was egregious enough for an award of punitive damages. It follows, then, that just as we may

review the record to determine whether a reasonable jury could have found that the defendants intentionally discriminated against Dr. McMillan, we may also review the record to determine whether a reasonable jury could have found defendants' conduct sufficiently worthy of condemnation and deterrence to justify exemplary damages.

Although we affirm the jury's finding of discrimination, we cannot say, on the basis of the record before us, that Dr. Thornton's and the MSPCA's intentional misconduct calls for punishment and deterrence beyond that secured by the compensatory award. Determining what conduct rises to the level at which an award of punitive damages is appropriate is a difficult task, but the evidence shows that the actions at issue in this case do not. We therefore hold that the district court abused its discretion in upholding the award of punitive damages, and that the award of punitive damages in this case constitutes a grossly excessive award of damages that shocks the conscience.[15]

Fifth, defendants argue that the MSPCA's liability is limited to $20,000 by a damages cap for charitable organizations under the Massachusetts charitable immunity law, which provides that liability for any "cause of action based on tort brought against a [charitable] corporation" shall not exceed $20,000 exclusive of interest and costs.

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[15] Dr. McMillan argues as well that the district court abused its discretion by excluding evidence of the MSPCA's assets, which she sought to introduce as guidance to the jury in its assessment of punitive damages. We decline to address the merits of this argument; having set aside the punitive damages award, the issue is moot.

See Mass. Gen. Laws ch. 231, § 85K. Although this statute applies to negligent, reckless, and intentional torts in the employment context, *see St. Clair v. Trustees of Boston Univ.*, 25 Mass.App.Ct. 662, 665-66, 521 N.E.2d 1044 (1988), it has been unclear whether a claim under chapter 151B is a "cause of action based on tort" and thus subject to the $20,000 limitation. We conclude that it is not.

Defendants and plaintiff engage in extensive exercises of interpretation to suggest the relevance of a variety of cases to this issue. Ultimately, we agree with Dr. McMillan that *Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. 1, 27, 679 N.E.2d 191 (1997), provides the most guidance. In that case, the SJC held that the chapter 231, section 85K damages limitation does not apply to damages awarded under Mass. Gen. Laws ch. 93A, the Massachusetts Consumer Protection Statute, on the basis that chapter 93A "creates an independent statutory basis of liability" and "forbid[s] conduct not previously unlawful under the common law of contract and tort or under any prior statute," *id.* (internal citation omitted). Like chapter 93A, chapter 151B creates rights that did not exist under the common law, *see, e.g., Melley v. Gillette Corp.*, 19 Mass.App.Ct. 511, 512-13, 475 N.E.2d 1227 (1985), *aff'd*, 397 Mass. 1004, 491 N.E.2d 252 (1986); the causes of action to which it gives rise thus cannot properly be called causes of action in tort. Accordingly, we hold that the damages award to Dr. McMillan pursuant to chapter 151B is not subject to the constraints of chapter 231.

Defendants next contend that the district court misapplied the relevant legal standard when it awarded attorney's fees because it did not award the appropriate hourly rates for the different types of services performed

and instead allowed Dr. McMillan's counsel to recover her standard hourly rate ($285 per hour) for performing tasks appropriate to either a less experienced lawyer or a secretary or paralegal. We agree.

We have established that "clerical or secretarial tasks ought not to be billed at lawyers' rates, even if a lawyer performs them." *Lipsett v. Blanco*, 975 F.2d 934, 940 (1st Cir.1992). Thus, "[t]ime spent on clerical or secretarial tasks by attorneys should be compensated at a rate commensurate with the nature of the tasks." *Massachusetts Dep't of Pub. Health v. School Comm. of Tewksbury*, 841 F.Supp. 449, 460 (D.Mass.1993); *see Deary v. City of Gloucester*, 789 F.Supp. 61, 66 (D.Mass.1992), *aff'd*, 9 F.3d 191 (1st Cir.1993). We think that it was an abuse of discretion to award the same rate for all tasks performed by Dr. McMillan's counsel, without regard to the nature of the tasks. Accordingly, we remand this issue in order that the court may determine those tasks which could have been adequately performed by a less-experienced lawyer or by a secretary or paralegal. The compensation for tasks so designated should be reduced to an appropriate level.

Finally, defendants argue that the trial court erred by computing interest on the back pay award from the date on which the cause of action accrued, rather than from the date plaintiff filed her complaint. This argument has no merit. As the district court stated, "the purpose of interest is to insure that the present value of an award fully compensates a plaintiff for her losses." Moreover, the SJC has held that an award of interest may be used to make an aggrieved party whole in chapter 151B actions. *See Conway*, 402 Mass. at 390 n. 7, 523 N.E.2d 255. Here,

an award of interest from the date Dr. McMillan was paid less than her counterparts comports with these standards.

C. *Cross-Appeal*

Plaintiff cross-appeals from the district court's grant of judgment as a matter of law in favor of defendants setting aside the jury's finding that Dr. Gambardella had tortiously interfered with Dr. McMillan's employment relationship with the MSPCA. She argues that she presented ample evidence during the trial to show that Dr. Gambardella's actions leading up to and including her termination were based on "an improper motive, active animosity and spite." We do not agree.

Viewing the evidence in a light most favorable to the plaintiff, *see Morrison*, 108 F.3d at 436, we conclude that the evidence did not permit a reasonable jury to find for the plaintiff. Under Massachusetts law, to make out the tort of intentional interference with a contractual relationship, a plaintiff must present evidence of "actual malice" or a "spiteful, malignant purpose, unrelated to the legitimate corporate interest." *Shea v. Emmanuel College*, 425 Mass. 761, 764, 682 N.E.2d 1348 (1997) (quoting *Wright v. Shriners Hosp. for Crippled Children, et al.*, 412 Mass. 469, 476, 589 N.E.2d 1241 (1992)). In addition, "[w]hen an employer or supervisor is acting within the scope of his employment responsibilities, the hiring and firing decisions are privileged unless he acted with malevolence." *Walker v. Waltham Hous. Auth.*, 44 F.3d 1042, 1049 n. 1 (1st Cir.1995).

Dr. McMillan presented evidence that Dr. Gambardella questioned her decisions and actions on various

occasions, that he had her replaced as the head of a hospital committee, that he did not reprimand another doctor who made a derisive comment to her during a staff meeting, and that he terminated her without notice, had her summoned while she was involved in a complicated radiological procedure, and then barred her from the hospital grounds. To support her claim of tortious interference, Dr. McMillan points to *O'Brien v. New England Tel. & Tel. Co.*, 422 Mass. 686, 687, 664 N.E.2d 843 (1996), in which the SJC held reasonable a jury's finding that an employer tortiously interfered with an employment relationship when he incessantly harassed employee, called her names in front of coworkers, and actively sought to make her cry. The facts of *O'Brien* are, however, much more egregious than those in this case. Insensitive though Dr. Gambardella's actions may have been, they did not demonstrate that type of ill will that the employer's actions in *O'Brien* did. We think that the district court properly concluded that these actions and statements did not demonstrate "anything more than a personality conflict with Dr. McMillan." For the most part, Dr. Gambardella's actions were properly within the scope of his duties as chief of staff at Angell, and, in any event, they failed to evince malevolent intent. No reasonable jury could have concluded otherwise.

Dr. McMillan argues next that the district court erred by granting the MSPCA, Dr. Thornton, and Dr. Gambardella summary judgment as to her claim that her termination was in retaliation for her filing of an administrative complaint of sex discrimination in 1989. She asserts that the district court misapplied the law in ruling that she had failed to establish a causal connection between the

filing and her termination because too much time had lapsed between the two events. She also argues that the court improperly viewed the facts from the defendants' perspective.

We review the district court's grant of summary judgment to defendants *de novo*. *See Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir.1997). Further, to determine whether the summary judgment record is sufficient to support a finding that the employment action was retaliatory, we review only those facts that were available at the summary judgment stage, construing all facts and inferences therefrom in favor of the plaintiff. *See Aybar v. Crispin-Reyes*, 118 F.3d 10, 13 (1st Cir.1997).

To succeed on a retaliation claim under both state and federal law, when, as here, there is no direct evidence of retaliatory animus, a plaintiff must both establish a prima facie case and prove that the defendants' legitimate business reasons for terminating the plaintiff were pretextual. *See Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 535 (1st Cir.1996) (discussing Title VII's analytical framework); *Lewis v. Gillette, Co.*, 22 F.3d 22, 24-25 (1st Cir.1994) (observing that Massachusetts retaliation law parallels federal law). Specifically, to establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in protected conduct under federal or Massachusetts law; (2) she suffered an adverse employment action; and (3) a causal connection existed between the protected conduct and the adverse action. *See Fennell*, 83 F.3d at 535. Once the plaintiff has made a prima facie showing, the burden of production shifts to the defendant to articulate a legitimate, non-retaliatory reason for its employment decision. *See id.* If the defendant does so, the plaintiff must show

that the defendant's proffered reason was not, in fact, the real reason for the decision and that the decision was the result of the defendant's retaliatory animus. *See id.*

We conclude that Dr. McMillan did not establish a prima facie case because she presented no evidence of a causal link between her termination and the filing of her complaint. The strongest argument Dr. McMillan makes in this regard is that Dr. Gambardella urged her not to file an MCAD complaint, stating that her doing so would make their relationship difficult. But, in light of undisputed facts in the summary judgment record, this does not suggest a causal connection between Dr. McMillan's filing of the discrimination claim, on one hand, and the actual deterioration and eventual termination of the employment relationship, on the other. The MSPCA and Dr. Gambardella asserted that Dr. McMillan had had an acrimonious relationship with other department heads and staff veterinarians at Angell, that she refused to treat birds after Angell refused to purchase her bird practice or pay her separately for the time she spent with avian patients, and that Dr. Gambardella received complaints from staff members about Dr. McMillan's attitude. Indeed, Dr. Gambardella stated that, by late 1991, his relationship with Dr. McMillan had deteriorated to the extent that he told Dr. Thornton that he would himself resign if Dr. McMillan were not terminated.

In addition, we agree with the district court that, even if Dr. McMillan had established a prima facie case, she did not present material facts that would permit a reasonable jury to find that Dr. Gambardella's explanation for her firing was pretextual and influenced instead

by a retaliatory motive. Although plaintiff presented evidence that she continued to work hard and to maintain a good relationship with much of the veterinary staff, she simply did not proffer evidence to refute defendants' showing that the veterinary staff complained to Dr. Gambardella about her performance and demeanor. In light of this undisputed evidence, even if Dr. Gambardella may have exercised arguably poor business judgment in terminating her, and in doing so in an abrupt, clumsy, and unfeeling manner, it would be unreasonable on the evidence for a factfinder to conclude that his explanation for the termination was, in fact, not the true reason. We therefore decline to order a new trial on this issue.

Third, Dr. McMillan argues that the district court improperly granted the MSPCA summary judgment on her claim that the MSPCA's failure to comply with the progressive discipline policy outlined in its Rules and Regulations Memorandum constituted a breach of contract because the policy was a contract governing her employment. She contends that the court improperly applied in a "wooden" fashion factors set forth in *Jackson v. Action for Boston Community Dev.*, 403 Mass. 8, 14-15, 525 N.E.2d 411 (1988), for determining whether a personnel manual's policy guidelines constitute a binding employment agreement. For support, she relies on *O'Brien*, 422 Mass. at 691-93, 664 N.E.2d 843, in which the SJC held that the terms of an employees' manual become part of an implied employment contract if the parties so agree, even if the terms of the manual have not been negotiated, and even if, in a continuing employment relationship, an employee only reasonably believed that the employer "was presenting the manual as a statement of

the conditions under which employment would continue." *Id.* at 693, 664 N.E.2d 843.

We agree with the district court's reasoning on this issue and its observation that, although personnel manuals may sometimes constitute an employment agreement, *see Jackson*, 403 Mass. at 13, 525 N.E.2d 411, the facts Dr. McMillan alleged do not support such an inference. As the district court observed, "Dr. McMillan does not claim to have bargained for any of the terms of the manual, to have signed the manual, or to have executed any other employment agreement with the MSPCA. Moreover, the manual described itself as a disciplinary guideline that 'is not all inclusive.' " *McMillan v. MSPCA*, 880 F.Supp. 900, 910 (D.Mass.1995). Contrary to Dr. McMillan's assertion, the court's analysis was not an application of inflexible prerequisites to finding an employment contract. Rather, the court's analysis employs the factors appropriately, as mere guidelines in the determination. *See O'Brien*, 422 Mass. at 692, 664 N.E.2d 843. We do the same. In addition to the factors highlighted by the district court, we note additionally that there is no evidence that Dr. McMillan reasonably expected that the MSPCA would follow the procedures with regard to her conduct or that of other supervisory veterinarians at Angell.

Dr. McMillan's next argument is that she should be granted a new trial on her claim for emotional distress damages. Dr. McMillan withdrew that claim after the district court adopted a magistrate's ruling ordering the disclosure of records of Dr. McMillan's therapist, which defendants had requested during discovery. Dr. McMillan argues that we must review this matter *de novo*, in light of

Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), in which the Supreme Court recognized a federal privilege against the compelled disclosure of counseling records. In the alternative, she argues that the district court erred as a matter of law and abused its discretion in its determination of the privilege issue.

We need not resolve these issues, however, because, as defendants rightly point out, Dr. McMillan's withdrawal of her claim for emotional distress damages constituted a waiver of the claim. This rule holds regardless whether new law has emerged which potentially may bolster a party's argument.

Finally, Dr. McMillan argues that the district court abused its discretion by determining that attorney's fees representing work on Dr. McMillan's contract and emotional distress claims were noncompensable and, accordingly, by reducing the attorney's fee award by twenty percent. She argues that the court was wrong in concluding that the contract claims were severable and not connected to the discrimination claims and thus not compensable. Further, she contends that the claims together represent no more than three percent of the total time documented.

As the district court correctly observed, fee awards are appropriate only for successful claims; unsuccessful claims warrant a fee award only if they are connected to the successful ones. *Krewson v. City of Quincy*, 74 F.3d 15, 19 (1st Cir.1996). Having determined that Dr. McMillan's unsuccessful emotional distress and contract claims were not connected with her successful claims, the court

thought appropriate "some apportionment between successful and unsuccessful claims," and correspondingly reduced the award by twenty percent.

"As a general rule, a fee-awarding court that makes a substantial reduction in either documented time or authenticated rates should offer reasonably explicit findings, for the court, in such circumstances, 'has a burden to spell out the whys and wherefores.' " *Brewster v. Dukakis*, 3 F.3d 488, 493 (1st Cir.1993) (quoting *United States v. Metropolitan Dist. Comm'n*, 847 F.2d 12, 18 (1st Cir.1988)). Although the district court did not explicitly state why it regarded the contract claims as unconnected to the discrimination claims, we do not think the court abused its discretion in making that determination and in denying fees for the time spent on that claim,[16] or on the emotional distress claim, which is even more clearly unrelated to Dr. McMillan's successful claims.

It is not so easily discernable, however, that twenty percent was a proper reduction. Although the district

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[16] We think that the situation in this case is different from that in *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 858-60 (1st Cir.1998), cited by plaintiff. First, because the jury form in that case had rendered unclear which of plaintiff's claims had been successful, we determined that the jury could have, in fact, found for the plaintiff on the very claim which the district court had inexplicably determined to be the "unrelated" one. In addition, we concluded that, in any event, the "unrelated" claim would have to have been developed as a foundational element of the claim that the district court had designated the successful one. By contrast, the district court here was correct that Dr. McMillan's contract claims were completely unassociated with her successful pay discrimination claims.

court has considerable discretion in determining fee awards, and although, as defendants point out, the fee petition is not amenable to easy analysis, our review of the fee petition does not convince us that the time plaintiff's counsel spent on the contract and emotional distress issues could reasonably be regarded as twenty percent of the total time documented.[17] In such a situation, the district court should, at a very minimum, make clear why it chose to reduce the fee award by such a substantial percentage. Because the court in this case provided no elaboration for the reduction, we remand this issue to the district court for reconsideration.[18]

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[17] Dr. McMillan's lead counsel, Dahlia Rudavsky, documented 26.6 hours spent on the emotional distress issue, and 19.2 hours on all of the claims that were dismissed on summary judgment. She points out that, even if the contract claims had represented half of those hours, she still would have devoted to them only 36 out of the 1296.30 hours for which Dr. McMillan sought fees.

[18] Plaintiff also seeks review of the district court's denial of attorney's fees requested for consultation and other work performed by Ellen Messing, a partner of plaintiff's primary counsel. Having reviewed the time sheets, we agree that, although Ms. Messing may have performed some work that Ms. Rudavsky may otherwise have had to perform herself, the great bulk of Ms. Messing's requested fees is for time she spent consulting with Ms. Rudavsky about the case. The district court acted within its realm of discretion in concluding that the conferences were not necessary to the litigation and in denying the requested fees.

III.

CONCLUSION

We *affirm* the district court's denial of judgment as a matter of law on plaintiff's pay discrimination claims and, in part, the jury's award of compensatory damages, and we *vacate* the jury's award of punitive damages. In addition, we *remand* for a recalculation of the damages in light of our determination that an amount representing lost benefits should not have been included in the award, and for recalculation of attorney's fees with regard to hourly compensation rates and the fee reduction for time spent on plaintiff's contract and emotional distress claims.

SO ORDERED.

Before TORRUELLA, Chief Judge, GODBOLD* and CYR, Senior Circuit Judges, SELYA, BOUDIN, STAHL, and LYNCH, Circuit Judges.

ORDER OF THE EN BANC COURT

June 16, 1998

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular, active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court En Banc,

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* Of the Eleventh Circuit, sitting by designation.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

OPINION

SELYA, BOUDIN, and LYNCH, Circuit Judges.

On consideration of the petition for rehearing *en banc* filed by plaintiff and on review of the panel opinion, three of the court's five active judges believe that the viability of *Blare*, or at least the most common and expansive reading of it, has been cast in doubt by *Matthews*, contrary to the view expressed in footnote 4 of the panel opinion. In particular, we are far from sure that Massachusetts law now requires a jury to be told that if it finds pretext, it must decide the case in favor of the plaintiff.

However, the defendants have not petitioned for rehearing *en banc* and there is some question whether the issue was properly preserved in the district court. Accordingly, we go no further than to say that if the issue had been properly preserved and was before the *en banc* court, we would be inclined to certify this issue to the Massachusetts Supreme Judicial Court because it is a matter of continuing importance.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 92-11178-RGS

DR. MARJORIE McMILLAN

V.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS; DR. GUS THORNTON: AND DR. PAUL GAMBARDELLA

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT OR IN THE ALTERNATIVE FOR A NEW TRIAL

November 12, 1996

STEARNS, D.J.

This vigorously contested employment discrimination case culminated in a substantial award of damages to the plaintiff, Dr. Marjorie McMillan, a radiologist who was fired from her position as a department head at Angell Memorial Animal Hospital ("Angell"). Angell is a charitable institution operated by the defendant Massachusetts Society for the Prevention of Cruelty to Animals ("MSPCA"). Much of the background of the case is laid out in *McMillan v. MSPCA*, 880 F. Supp. 900 (D. Mass. 1995).

Over the course of the litigation, several of the plaintiff's claims were extinguished by dispositive motions – her equal pay claims under Title VII of the Civil Rights Act of 1964 and M.G.L. c. 93, § 102, her claims of unlawful retaliation, her claims of common law breach of contract and negligent performance of contractual duties, and a

claim of tortious interference with advantageous relations against Dr. Gus Thornton, the President of the MSPCA.[1]

The case proceeded to trial on the following causes of action: (1) a violation of the federal Equal Pay Act (against the MSPCA): (2) an equal pay/discrimination claim under M.G.L. c. 151B (against the MSPCA and Dr. Thornton); and (3) a claim of intentional interference with advantageous relations (against Dr. Paul Gambardella, Angell's Chief of Staff).

Trial began on December 4, 1995, and culminated in a jury verdict on December 18, 1995. The jury found for Dr. McMillan as follows: (1) on the federal Equal Pay Act claim;[2] (2) on the state Chapter 151 B claim, with damages assessed at $183,784.50;[3] and, (3) on the intentional interference claim with damages assessed at $197,550 in back pay (from the time of her dismissal to the date of the jury's verdict) and $99,375.23 in front pay.[4] The jury also assessed punitive damages under Chapter 151B against the MSPCA in the amount of $135,662.50 and against Dr. Thornton in the amount of $171,250.

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[1] Defamation claims brought in a counterclaim by the MSPCA against Dr. McMillan were also eventually dismissed. See Memorandum and Order of November 2, 1995.

[2] Because of the time limitations on back pay awards under the federal Equal Pay Act, the court awarded Dr. McMillan the larger damages assessed by the jury on her parallel state Chapter 151B claim.

[3] To this sum the court added $178,915 in interest.

[4] The court added $84,846.50 in interest to the back pay award.

Following the entry of judgment a second round of litigation began involving the instant motions and plaintiff's application for attorney's fees and costs (which is addressed in a separate Memorandum). The last filing was received on August 12, 1996. Before the court are defendants' motions for judgment as a matter of law, or in the alternative, for a new trial.

LEGAL STANDARDS

"A federal court may not set aside a jury verdict and direct the entry of a contrary verdict unless no reasonable jury could have returned a verdict adverse to the moving party." *Havinga v. Crowley Towing and Transportation Co.*, 24 F.3d 1480, 1483 (1st Cir. 1994). Stated another way, "[a] jury verdict may not be set aside as a matter of law under Fed.R.Civ.P. 50(b) except on a 'determination that the evidence could lead a reasonable person to *only one conclusion.*' " *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 66 (1st Cir. 1993) (emphasis in original).

A motion for a new trial may be granted only where the jury's verdict is so contrary to the clear weight of the evidence that to allow it to stand would result in a miscarriage of justice. *Kearns v. Keystone Shipping Co.*, 863 F.2d 177, 181 (1st Cir. 1988). "[T]he trial judge's discretion, though great, must be exercised with due regard to the rights of both parties to have questions which are fairly open resolved finally by the jury at a single trial." *Coffran v. Hitchcock Clinic, Inc.*, 683 F.2d 5, 6 (1st Cir. 1982). Thus, the judge "cannot displace a jury's verdict merely

because he disagrees with it or would have found otherwise in a bench trial." *Ahern v. Scholz*, 85 F.3d 774, 780 (1st Cir. 1996) (quoting *Coffran*, supra at 6).

DISCUSSION

Defendants' motion for judgment as a matter of law raises fifteen issues, almost all of which challenge the sufficiency of the evidence presented by Dr. McMillan in support of her claims. The first, Dr. Thornton's "uncontradicted evidence" that he relied on gender-neutral market factors to set the salaries of his department heads, is the easiest to dispose of. The jury obviously did not credit his testimony.[5] See *United States v. Jett*, 491 F.2d 1078, 1080 (1st Cir. 1974). The next three items challenge the testimony of Dr. Arlene Ash, plaintiff's expert statistician, objecting that the size of the sample she used was insufficient to support a regression analysis. Defendants also complain that Dr. Ash's model incorporated too few variables. Here, as plaintiff points out, defendants misstate Dr. Ash's testimony and methodology. Dr. Ash constructed her model based on a ten year employment history of eighty veterinarians at Angell, and not merely on the experience of heads of departments as defendants claim. She also considered a range of variables including longevity, board certification, and department size in designing her model. "While the omission of variables

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[5] It does not follow that because Dr. McMillan "admitted" that market conditions, seniority, value as a "team player," and so on, are gender-neutral factors that the jury was compelled to believe Dr. Thornton's testimony that he based his salary decisions on these same neutral considerations.

from a regression analysis may render the analysis less probative than it might otherwise be, it can hardly be said absent some other infirmity, that an analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.' Normally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). More fundamentally, as plaintiff points out, defendants misapprehend the fact that it was they, and not the plaintiff, who carried the burden under the Equal Pay Act of persuading the jury that Dr. McMillan's salary, which they concede was lower than the salaries of male department heads, could be explained by "any other factor other than sex." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974); *Byrd v. Ronayne*, 61 F.3d 1028, 1033 (1st Cir. 1995). If there were weaknesses in Dr. Ash's presentation (I do not suggest that there were), they were explored fully on cross-examination and in the testimony of defendants' expert, Dr. Weisberg, without discernible effect on the jury.[6]

The next three items on defendants' list challenge the jury's finding that Dr. Thornton paid Dr. McMillan less *because* she was a woman, in other words, that Dr. Thornton and the MSPCA violated M.G.L. c. 151B. Here, of course, Dr. McMillan was not obligated to produce direct evidence that defendants were motivated by gender discrimination. It was enough under Massachusetts law that

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[6] Dr. Weisberg disagreed with Dr. Ash's finding of a pattern of discrimination but conceded that her model had produced significantly cognizable results. Dr. Weisberg based his own testimony on Dr. Ash's data.

she prove that defendants' proffered explanation for her lower pay (the effects of longevity, market forces, and salary negotiations) was a pretext. If satisfied that she had met this burden (as it apparently was), the jury was permitted to draw an inference that the decision to pay Dr. McMillan less than her male colleagues was motivated by discrimination. See *Blare v. Husky Injection Molding Systems, Boston, Inc.*, 419 Mass. 437, 445 (1995). Dr. McMillan did, however, also offer some evidence of a discriminatory mindset on the part of Dr. Thornton in the form of three demeaning comments he made to women subordinates at Angell, as well as evidence through Dr. Ash that women veterinarians at Angell were almost uniformly paid less by Dr. Thornton than their male colleagues.

Defendants' point that a "stray remark" is insufficient under First Circuit precedent to provide the "plus" necessary under Title VII to prove that a pretext is a mask for discrimination, merely repeats the courts rationale for dismissing Dr. McMillan's Title VII claims. See *McMillan*, 880 F. Supp. at 908. But as the court also noted in denying the motion to dismiss Dr. McMillan's state claims, a plaintiff's burden in this regard is considerably relaxed under Chapter 151B. Id. at 908-909. And while it is true, as defendants state, that statistical evidence of a pattern of discrimination has less probative significance in a case alleging disparate treatment than it does in one involving disparate impact, that is not to say that it has no significance at all, particularly in a case like this one, where the jury could have found a plausible connection between Dr. Thornton's treatment of women generally at Angell and his treatment of Dr. McMillan in particular. *LeBlanc v.*

Great American Ins. Co., 6 F.3d 836, 848 (1st Cir. 1993). See also *Bazemore*, supra, at 400-404.

Items 11 and 12 challenge the sufficiency of the evidence on which the jury awarded back pay and punitive damages to Dr. McMillan. This issue, as plaintiff points out, was not raised before the case was submitted to the jury. "The law is crystal clear that a 'party may not base its motion for a judgment n.o.v. on a ground that was not argued in its motion for a directed verdict.' " *Perdoni Brothers, Inc. v. Concrete Systems, Inc.*, 35 F.3d 1, 3 (1st Cir. 1994).

I turn now to the more troubling issues raised by the defendants, those relating to the claim that Dr. Gambardella intentionally interfered with Dr. McMillan's employment relationship with the MSPCA. "[S]omething more than intentional interference is required" to make out the tort. *United Truck Leasing Corp. v. Geltman*, 406 Mass. 811, 815 (1990). That "something more" is "actual malice" or "a spiteful, malignant purpose, unrelated to the legitimate corporate interest." *King v. Driscoll*, 418 Mass. 576, 587 (1994). Stated another way, the "additional ingredient" is "improper conduct, which may include ulterior motive (e.g., wishing to do injury) or wrongful means (e.g., deceit or economic coercion."). *Schwanbeck v. Federal Mogul Corp.*, 31 Mass. App. Ct. 390, 412 (1991). Even unreasonable conduct influenced by personal animosity or hope of personal gain will not, without more, establish tortious interference. *Gram v. Liberty Mutual Ins. Co.*, 384 Mass. 659, 664 (1981). See *King*, supra at 587 ("[P]ersonal dislike will not warrant an inference of requisite ill will"). See also *Clement v. Rev-Lyn Contracting Co.*, 40 Mass. App. Ct. 322, 325 (1996) (by lowering the

threshold of malignant purpose to one of mere unreasonableness, the trial judge improperly diminished the plaintiff's burden of proof). Compare *O'Brien v. New England Telephone & Telegraph Co.*, 422 Mass. 686, 690 (1996) ("Screaming at an employee repeatedly to humiliate her in front of other employees, calling her names, and denying her work to do when work is available could be found both to exceed the protected conduct of a supervisor and to constitute malicious conduct unrelated to an employer's legitimate business interests.")

Plaintiff's evidence against Dr. Gambardella, viewed in the most flattering light, is as follows: (1) that he questioned Dr. McMillan about the number of vacation days to which she was entitled; (2) that he responded to Dr. McMillan's complaints about his management of Angell with the query, "Why do you work here?"; (3) that he called Dr. McMillan's refusal to see an emergency patient "immoral"; (4) that he failed to reprimand another doctor who called Dr. McMillan a "damn secretary" during an argument at a staff meeting; (5) that he peremptorily replaced Dr. McMillan as the head of a hospital committee with someone of more junior rank; (6) that he second-guessed her decision to order new equipment for her department; and (7) that after being fired, he barred her permanently from the grounds of Angell. See Plaintiff's Opposition to Defendants' Motion for Judgment as a Matter of Law, at 18-19.[7]

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[7] Plaintiff also contends that Dr. Gambardella asked that Dr. Thornton approve Dr. McMillan's termination on the false grounds that she was a divisive and disruptive presence at Angell, something the plaintiff denies. This evidence, even if it

No reasonable jury could have concluded, consistent with the court's instructions, that these actions and statements by Dr. Gambardella demonstrated anything more than a personality conflict with Dr. McMillan, and the basis for his judgment, right or wrong, that Dr. McMillan had become a fractious presence at Angell. Moreover, when an employer or supervisor is acting within the scope of his employment responsibilities, his acts are privileged unless motivated by actual malice. *Walker v. Waltham Housing Authority*, 44 F.3d 1042, 1049 & n.1 (1st Cir. 1995); *Gram*, supra at 663. Inquiring about an employee's accrued vacation time, questioning the expenditure of hospital funds, appointing chairs of committees, reprimanding a doctor for failing to treat a critical patient,[8] and barring a terminated employee from the employer's premises, are matters falling within the privileged scope of Dr. Gambardella's duties as Angell's Chief of Staff. That Dr. Gambardella might have exercised his authority more sensitively is simply irrelevant to the issue whether he acted with malice. The other two instances cited by Dr. McMillan, Dr. Gambardella's failure to censure a remark made by another doctor during

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suggested malice rather than a personal opinion about Dr. McMillan's behavior, is derived from a deposition that was never offered at trial. According to my notes, the only pertinent conversation between Dr. Thornton and Dr. Gambardella occurred just prior to Dr. Gambardella's decision to fire Dr. McMillan, when he told Dr. Thornton that "it was going to be her or me." Plaintiff properly does not suggest that malice could be inferred from this apparently factual statement.

[8] Dr. Gambardella's assertion that Dr. McMillan's refusal to see the patient was "immoral" was a strong choice of words, but not an unreasonable one in the context in which it was made.

an argument, and his exasperated response to Dr. McMillan's complaints about his management of the hospital, are simply insufficient to support a finding of malevolent intent on his part. No reasonable jury could have found otherwise.[9] Consequently, on the intentional interference claim, Dr. Gambardella is entitled to judgment as a matter of law.[10]

Defendants' motion for a new trial raises a number of issues regarding the sufficiency of the evidence that I have rejected in connection with the motion for judgment as a matter of law. Defendants also identify as prejudicial error: (1) the court's refusal to strike Dr. Ash's testimony; (2) the admission of Dr. McMillan's testimony that in 1987 she had been offered a $50,000 teaching position at the Tufts School of Veterinary Medicine; and (3) the court's

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[9] I cannot help but believe that the jury was offended by the manner in which Dr. Gambardella fired Dr. McMillan, giving her only fifteen minutes to collect her belongings and barring her permanently from the grounds of Angell. See Plaintiff's Opposition to Defendants' Motion for a New Trial, at 9. If the jury was so influenced in finding for Dr. McMillan on the intentional interference claim, it disregarded the court's clear instruction "that an employer has no obligation to fire an employee in a nice way." Even if considered as a possible reflection on Dr. Gambardella's state of mind in terminating Dr. McMillan, his actions are simply insufficient to show actual malice on his part, as again, they fall within the privileged scope of his duties.

[10] Because any award of front pay is dependent on this claim, I will also vacate that aspect of the jury's award. See *DeRose v. Putnam Management Co., Inc.*, 398 Mass. 205, 211 n.4 (1986). It is not necessary that I address the defendants' contention that the evidence of future damages was too speculative to support the jury's determination.

refusal to grant a mistrial after plaintiff's counsel persisted in a question regarding the size of the MSPCA's endowment after the court sustained an objection. Defendants also contend that the awards of back pay and punitive damages were excessive. With respect to Dr. Ash, defendants argue that she was not qualified to render an expert opinion. I simply disagree, based on her past training and experience and the quality of her testimony. Cf. *United States v. Members of Estate of Boothby*, 16 F.3d 19, 22-23 (1st Cir. 1994); *United States v. Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987). I agree with Dr. McMillan that her testimony regarding the offer from Tufts was admissible to show her state of mind during the 1987 salary negotiations with Dr. Thornton and to explain her negotiating position. As to the question regarding the MSPCA's endowment, I credit counsel's assertion that he[11] had a good faith basis for asking it. See *Rowlett v. Anheuser Busch*, 832 F.2d 194, 207 (1st Cir. 1987). I also credit counsel's explanation that he misunderstood the reason why the court excluded the initial question and attempted to reformulate it in a way that he thought would be acceptable. Indeed, some of the responsibility for the confusion may lie with the court for not explaining its reasoning more fully at the time.[12] Whatever the reason, the court immediately instructed the jury in the strongest possible terms to disregard both questions. See *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987).

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[11] Stephen Voltz, the second chair to attorney Dahlia Rudavsky at the trial.

[12] As defendants state, there is a significant difference between a corporation's access to its profits and a charitable institution's access to funds in a restricted endowment.

With respect to the award of back pay, it is apparent that the jury based its calculation on an average of male department heads' salaries, awarding Dr. McMillan the difference plus 21 percent in benefits.[13] Far from being irrational, this formula makes eminent sense. See *Scarfo v. Cabletron Sys.*, 54 F.3d 931, 954 (1st Cir. 1995). I have already indicated that I do not find the award of punitive damages excessive. While I am sensitive to the fact that punitive damages are "not favored in the law and are allowed only with caution, and within normal limits," *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996), the jury was clearly offended by the treatment Dr. Thornton and the MSPCA accorded to Dr. McMillan and the indulgence afforded by both to an atmosphere dismissive of the institution's female employees. Punitive damages "are awarded as a matter of public policy to punish outrageous conduct by the defendant or to deter similar conduct in the future." Id. Both of these purposes are served by the jury's award. While the amount might be larger than another jury might have assessed, particularly given the MSPCA's status as a charitable corporation, there is no "mathematical bright-line" defining how much punitive damages is too much. Pacific *Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). While the award will cause some hardship to the MSPCA, it will not inflict ruin. Rather it will impress the message the jury clearly intended to send, that the community will not tolerate discriminatory treatment of women in the workplace,

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[13] Dr. McMillan testified without objection that Angell's management told her that this was the rate she should use in determining salary expenses for her own department.

even workplaces dedicated to otherwise laudable purposes. In sum, I find nothing inappropriate, grossly excessive, or shocking to the conscience in the jury's award. See *Brown v. Freedman Baking Co., Inc.*, 810 F.2d 6, 11 (1st Cir. 1987); *Fishman v. Clancy*, 763 F.2d 485, 490 (1st Cir. 1985). See also *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996). Finally. it was within the power of the jury to allocate the award as it did between the MSPCA and Dr. Thornton, as the jury could have reasonably concluded that the MSPCA shared some degree of culpability for its failure to regulate Dr. Thornton's conduct. See *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 705 (1st Cir. 1995).

ORDER

For the foregoing reasons, defendants' motion for judgment as a matter of law is *ALLOWED* in part and *DENIED* in part. Judgment will enter for Dr. Gambardella on the intentional interference claim. The jury's award of back pay on that claim is *VACATED*. The jury's award of front pay is also *VACATED*. In all other respects, the motion is *DENIED*. The motion for a new trial is *DENIED*. The Clerk will modify the judgment entered on January 10, 1996, accordingly.

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN THE MATTER OF:

Case: 1:92-cv-11178

Judge Richard G. Stearns - pre

McMillan – plaintiff

v.

Massachusetts Societ – defendant

NOTICE OF ACTION BY THE COURT

**The following ruling was made on 10/6/98 and entered on the docket:

> Judge Richard G. Stearns. Endorsed Order entered denying [274-1] motion for Court to set remittitur of punitive damages, with alternative of a new trial on same. "The First Circuit was clear in its holding that no reasonable jury could have found defendants' conduct "sufficientley [sic] worthy of condemnation and deterrence to justify exemplary damages" and that a compensatory award was all that plaintiff was entitled to." cc: all counsel of record.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

September 8, 1998

Ms. Dahlia C. Rudavsky
Messing & Rudavsky, P.C.
44 School Street
Boston, MA 02108

Re: Marjorie C. McMillan
v. Massachusetts Society for the
Prevention of Cruelty to Animals,
et al.
Application No. A-206

Dear Ms. Rudavsky:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on September 8, 1998, extended the time to and including November 13, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Jeffrey D. Atkins
Jeffrey D. Atkins
Assistant Clerk

APPENDIX E

[p. 11-1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 92-11178-RGS

STEARNS, D.J.
and a jury.

DR. MARJORIE McMILLAN
Plaintiff

v.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS; DR. GUS THORNTON and DR. PAUL GAMBARDELLA,
Defendants

(DAY 11 OF JURY TRIAL)

APPEARANCES:

MESSING & RUDAVSKY, P.C., (By Attorney Dahlia C. Rudavsky) 44 School Street, Suite 1000, Boston, MA, 02108 Representing the plaintiff.

and

Stephen Voltz, Esquire, 50 Congress Street, Boston, MA 02109, Representing the plaintiff.

PEABODY & BROWN (By Attorney Melissa Bayer Tearney and Marcus E. Cohn, P.C., Esquire) 101 Federal Street, Boston, MA, 02110, Representing the defendants and counterplaintiffs.

Courtroom No. 1
U.S.P.O. & Courthouse
Boston, MA, 02109
December 18, 1995

* * *

[p. 11-94] (5:35 p.m.)

(In open court.)

THE CLERK: Madam Forelady, has the jury reached a verdict?

THE FORELADY: Yes, we have.

THE COURT: Mrs. Robbins, would you record the verdict?

THE CLERK: Will the jury stand, please?

Madam Forelady and members of the jury, harken to your verdict as the Court will record it. You, upon your [p. 11-95] oath, do say as follows in answer to special questions:

Part 1, the Federal Equal Pay Act:

Question 1: Has Dr. McMillan proven that she was paid less by the MSPCA than male department heads for doing a job substantially equal to theirs?

THE FORELADY: Yes.

THE CLERK: Question 2: Has the MSPCA proven that the disparity in pay between Dr. McMillan's salary and the salaries of the male department heads is explained by any factor other than gender?

THE FORELADY: No.

THE CLERK: Question 3: In paying Dr. McMillan less than her male counterparts, did the MSPCA act willfully?

THE FORELADY: Yes.

THE CLERK: QUESTION 4: What sum of money does the jury award Dr. McMillan to compensate her for the disparity in her pay?

THE FORELADY: $38,835.50

THE CLERK: Part 2, the State Discrimination Claim.

Question 5: Has Dr. McMillan proven that she was paid less by the MSPCA and Dr. Thornton for doing substantially the same job as her male counterparts?

THE FORELADY: Yes.

[p. 11-96] THE CLERK: Question 6: Has Dr. McMillan proven that she was the victim of intentional discrimination or that the explanation given by the MSPCA and Dr. Thornton for any disparity in her pay was a pretext?

THE FORELADY: Yes.

THE CLERK: Question 7: What sum of money does the jury award Dr. McMillan to compensate her for the disparity in her pay resulting from gender discrimination?

THE FORELADY: $183,784.00.

THE CLERK: Question 8: What sum of money does the jury award in punitive damages against the MSPCA?

THE FORELADY: $135,662.50.

THE CLERK: Question 9: What sum of money does the jury award in punitive damages against Dr. Thornton?

THE FORELADY: $171,250.

THE CLERK: Part 3, the Intentional Interference Claim.

Question 10: Has Dr. McMillan proven that Dr. Gambardella interfered with her employment relationship with the MSPCA by improper means or with an improper motive?

THE FORELADY: Yes.

THE CLERK: Question 11: What sum of money does the jury award to Dr. McMillan to compensate her for any loss in her earnings from the time she was fired until the present?

[p. 11-97] THE FORELADY: $99,375.25.

THE CLERK: So say you, Madam Forelady?

THE FORELADY: Yes.

THE CLERK: So say you, all members of the jury?

THE JURY: Yes.

THE CLERK: Please be seated.

THE COURT: Ms. Fazio (phonetic) and members of the jury, I know you have invested a lot of time and effort in this case. Your service as jurors is now over.

You are free to leave if you wish. I know you will be eager to get home. It is rather late in the day.

If possible, I would like to meet each of you. I will be through here in a minute or so and I will join you upstairs, but my power to compel you to do anything has now ended.

All right. The jury may be excused.

(Whereupon the jury was excused.)

* * *

Supreme Court, U.S.
FILED
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CLERK

No. 98-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DR. MARJORIE C. McMILLAN,

Petitioner,

vs.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, DR. GUS THORNTON and DR. PAUL GAMBARDELLA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS AND DR. GUS THORNTON

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction to consider Petitioner's appeal, where Petitioner has failed to raise the Seventh Amendment issue in the United States Court of Appeals for the First Circuit under circumstances requiring it?

2. Whether the decision of the United States Court of Appeals for the First Circuit, applying Fed. R. Civ. P. 50 and vacating the punitive damages and lost benefits awards based on insufficient evidence, violates the Seventh Amendment?

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent, Massachusetts Society for the Prevention of Cruelty to Animals, hereby discloses that it has no parent or subsidiary companies.

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APPENDIX

Appendix A — Order Of The United States Court Of Appeals For The First Circuit Denying The Petition For A Writ Of Mandamus Dated And Entered November 25, 1998 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The District Of Massachusetts On Reconsideration Of Plaintiff's Petition For Costs And Attorneys' Fees Dated And Docketed October 28, 1998 ..... 3a

Appendix C — Excerpts Of Respondents' Brief In The United States Court Of Appeals For The First Circuit Dated and Filed June 6, 1997 ..... 8a

Respondents hereby oppose the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit (the "First Circuit").

COUNTERSTATEMENT OF JURISDICTION

As set forth below, this Court lacks jurisdiction to hear the appeal because, despite the clear ruling of the First Circuit on punitive damages and lost benefits implicitly applying a Fed. R. Civ. P. 50 standard, Petitioner failed to properly raise the Seventh Amendment issue before the First Circuit.

COUNTERSTATEMENT OF THE CASE

This case was tried to a jury in the United States District Court for the District of Massachusetts (the "trial court") in December 1995. The jury returned a verdict in Petitioner's favor on her Massachusetts General Laws, chapter 151B claim.[1] After trial, Respondents filed post-trial motions pursuant to both Fed. R. Civ. P. 50 and 59 seeking, *inter alia*, to vacate Petitioner's punitive damages award and reduce her back pay award by 21%, the value of the benefits Petitioner allegedly lost because she was paid less than her male counterparts. In their Motion For Judgment As A Matter of Law ("Rule 50 Motion"), Respondents argued that the trial court should set aside the punitive damages and lost benefits awards because Petitioner offered insufficient evidence that she was entitled to them. (J.A.[2] at 501-503). In their Motion for New Trial ("Rule 59 Motion"), Respondents argued, in the alternative, that the awards were excessive and against the weight of the evidence. (J.A. at 498-500). The trial court denied the Rule 50 Motion with respect to these damages issues on the ground that Respondents had failed to address them in their Rule 50 Motion

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1. The jury also returned a verdict in Petitioner's favor on her claim for tortious interference with contractual relations. The trial court granted Respondents' Fed. R. Civ. P. 50 Motion on this count and the First Circuit affirmed.

2. "J.A." refers to the Joint Appendix filed with the First Circuit.

at the conclusion of Petitioner's case and, therefore, had waived them. (P.A.[3] at 53a). The trial court denied the Rule 59 Motion on the merits. (P.A. at 56a-59a).

The Respondents appealed the trial court's rulings on the Rule 50 and 59 Motions to the First Circuit. Respondents restated their position to the First Circuit that Petitioner had not offered sufficient evidence, as a matter of law, that she was entitled to punitive damages or lost benefits. (R.A.[4] at 8a-10a). Petitioner did not challenge Respondents' appeal of the trial court's denial of their Rule 50 Motion on punitive damages and only argued that the trial court did not abuse its discretion. (Brief of Plaintiff/Appellee at 25-26). Moreover, Petitioner did not argue that Respondents had waived their Rule 50 Motion as to either punitive damages or lost benefits. (*Id.* at 23-26). In the alternative, Respondents requested that they be granted a new trial on these issues. (R.A. at 8a-10a).

In its March 18, 1998 opinion, the First Circuit vacated the punitive damages award on the basis that Petitioner failed to offer sufficient evidence at trial to support a punitive damages award as a matter of law, implicitly reversing the trial court's denial of the Respondents' Rule 50 Motion.[5] The First Circuit exercised its well established authority to "review the record to determine whether a *reasonable jury could have found* defendants' conduct *sufficiently worthy* of *condemnation* and *deterrence* to justify exemplary damages." (P.A. at 33a) (emphasis supplied). The First Circuit then held:

> [*W*]*e cannot say* on the basis of the record before us, that Dr. Thornton's and the MSPCA's *intentional misconduct* calls for *punishment* and *deterrence beyond that secured by the compensatory award.* Determining what rises to

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3. "P.A." refers to Petitioner's Appendix attached to the Petition for Writ of Certiorari.

4. "R.A." refers to the Respondents' Appendix attached hereto.

5. Although the First Circuit does not cite Fed. R. Civ. P. 50 in its opinion, its analysis leaves no doubt as to the standard applied.

> the level at which an award of punitive damages is appropriate is a difficult task, but *the evidence shows that the actions at issue in this case do not.*[6]

Id. (emphasis supplied).

Having determined that there was insufficient evidence for a punitive damages award as a matter of law, the First Circuit appropriately vacated the punitive damages award. The First Circuit did not perform an excessiveness analysis or discuss remand, recalculation, reduction, remittitur or the Petitioner's entitlement to a new trial. The First Circuit did not find that the trial court abused its discretion. In its conclusion, the First Circuit simply stated that "[W]e *vacate* the jury's award of punitive damages." (P.A. at 45a).

Likewise, the First Circuit explicitly held that Petitioner was not entitled to recover lost benefits as part of her back pay award because she failed to offer legally sufficient evidence at trial that she had incurred these damages:

> . . . [P]laintiff presented *no evidence* that she incurred insurance expenses. In addition she presented *no evidence* that any employer-contributed retirement benefits were tied to the amount of her salary. . . . *Because there was no competent evidence from which a reasonable jury could conclude that Dr. McMillan suffered any loss in benefits as a result of her lower salary*, Dr. McMillan's back pay award should be accordingly reduced by the amount of the lost benefits award.

(P.A. at 29a-30a) (emphasis supplied). The First Circuit vacated the amount of the back pay award allocated to lost benefits and remanded to the trial court the recalculation of back pay damages. (P.A. at 45a).

On April 1, 1998, Petitioner filed a Petition for Rehearing and Suggestion of Rehearing In Banc and a memorandum in support

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6. Petitioner's characterization that the First Circuit vacated the punitive damages award because it was "grossly excessive" and "shock[ing] to the conscience," (Petition at 5), takes the First Circuit's words out of context and is a misrepresentation of that decision.

thereof ("Petition for Rehearing"), in which she extensively argued that the First Circuit erred in vacating the punitive damages award in light of a newly decided Supreme Judicial Court decision, *Dartt v. Browning-Ferris Indus*, 427 Mass. 1, 691 N.E. 2d 526 (1998). Specifically, Petitioner argued that the evidence presented at trial was *legally sufficient* to support a punitive damages award in light of *Dartt's* ruling that punitive damages are warranted under Massachusetts General Laws, chapter 151B when the defendant's intentional discrimination has been undertaken with the knowledge of its illegality. Petitioner contended that the First Circuit "ignored proven evidence" of Respondents' knowledge that their conduct was illegal. She further argued that the First Circuit "wrongly assumed that [Petitioner] relied solely on the finding of intentional discrimination, standing alone, to support the punitive damages award." (Memorandum in Support of Petition for Rehearing, and Suggestion for Rehearing In Banc, of Plaintiff/Appellee at 9-10). Petitioner requested that the First Circuit "reinstate" the punitive damages award. (*Id.* at 12). Petitioner *did not seek* a remand for remittitur or a new trial, although she argued that the jury's award was not excessive, ostensibly using a Rule 59 standard. (*Id.* at 10-12). On June 16, 1998, Petitioner filed supplemental authority with the First Circuit in further support of her contention that there was legally sufficient evidence to support a punitive damages award.

Nowhere in these extensive filings before the First Circuit did Petitioner raise, or even mention, that the First Circuit decision, vacating the punitive damages and lost benefits awards, violated the Seventh Amendment. On June 16, 1998, the First Circuit denied the Petition for Rehearing.[7] (P.A. at 45a-46a).

On July 31, 1998, over four months after the First Circuit issued its opinion, and subsequent to her filing the Petition for Rehearing, Petitioner filed motions with the trial court, including her Motion for Remittitur on Punitive Damages with Alternative for a New Trial, ("Motion for Remittitur") (collectively "Post Appeal Motions"). In the Post Appeal Motions, Petitioner argued *for the first time* that: (1) the First Circuit reversed the trial court's denial of Respondents'

7. Pursuant to Fed. R. App. P. 35(b) and 40(a), Respondents did not file an opposition because the First Circuit did not request them to do so.

Rule 59 Motion and intended to remand the punitive damages award to the trial court for a remittitur or, alternatively, a new trial pursuant to the Seventh Amendment's Re-Examination Clause and this Court's holding in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) ("Gasperini"); and (2) for the same reason, she was entitled to remittitur of the lost benefits award or a new trial.

On October 6, 1998, the trial court denied Petitioner's Motion for Remittitur, ruling:

> The *First Circuit was clear* in its holding that *no reasonable jury* could have found defendants' conduct "sufficientley [sic] worthy of condemnation and deterrence to *justify exemplary damages*" and that a *compensatory award was all that plaintiff was entitled to.*

(P.A. at 60a) (emphasis supplied).

On October 28, 1998, the trial court also denied Petitioner's motion for a new trial on the lost benefits issue, ruling:

> The *direction of the First Circuit panel with respect to the employee benefit award is unambiguous*: "*Because there was no competent evidence from which a reasonable jury could conclude that Dr. McMillan suffered any loss in benefits as a result of her lower salary*, Dr. McMillan's back pay award should be accordingly reduced by the amount of the lost benefits award." 140 F.3d at 305-306. *Plaintiff's belated attempt to marshal such evidence comes too late.*

(R.A. at 4a) (emphasis supplied).

Undeterred, Petitioner filed a Petition For Writ of Mandamus in the First Circuit seeking to have the trial court grant her a remittitur or new trial on the punitive damages issue.[8] On November 25, 1998, while this Petition for Writ of Certiorari was pending, the First Circuit

8. Petitioner did not seek to have the First Circuit order the trial court to grant a new trial on the issue of her entitlement to lost benefits.

denied the Petition For Writ of Mandamus, stating in no uncertain terms that it intended to vacate the punitive damages award because Petitioner did not offer legally sufficient evidence at trial to support it:

> Petitioner seeks a writ of mandamus directing the district court to afford her a remittitur in her punitive damages award or the option of a new trial. She contends that, as part of our disposition of the recent appeal . . . this court intended that such relief would be provided on remand. *To the contrary, our intention was that judgment enter for defendants on the punitive damages issue. And we think the language of the opinion . . . made this clear. See, e.g., id.* at 295 ("[w]e . . . reverse the award of punitive damages"); *id.* at 307 ("we cannot say, on the basis of the record before us, that [defendants'] intentional misconduct calls for punishment and deterrence beyond that secured by the compensatory award"). *Petitioner has thus failed to establish any basis for the requested relief*, much less a "clear entitlement" thereto as is required for the extraordinary writ of mandamus. . . .

(R.A. at 1a-2a) (emphasis supplied).

REASONS FOR DENYING THE WRIT

This Court should deny the Writ. This Court lacks jurisdiction to hear the appeal because Petitioner failed to properly raise the Seventh Amendment issue before the First Circuit in her Petition for Rehearing.

Assuming, *arguendo*, that this Court has jurisdiction, the record establishes that the First Circuit vacated the punitive damages and lost benefits awards by granting Respondents' Rule 50 Motion in substance. It is well established, and conceded by Petitioner, that appellate review of a denial of a Rule 50 Motion does not violate the

Seventh Amendment's Re-Examination Clause. *Neely v. Eby Construction Co.*, 386 U.S. 317, 321-322 (1967), *reh'g denied*, 386 U.S. 1027 (1967). Likewise, it is undisputed that upon an appellate court's reversal of a trial court's denial of a Rule 50 Motion, the appellate court has the authority to enter judgment thereon. *Id.* at 321-323.

Petitioner's entire argument rests on the premise that the First Circuit vacated the punitive damages and lost benefits awards on the ground that the trial court had abused its discretion in denying Respondents' Rule 59 Motion. Her position is utterly without support in the record. To sustain her Petition, Petitioner resorts to convoluted arguments and a tortured reading of the First Circuit's opinions. In a less than subtle manner, Petitioner attempts to create confusion as to the First Circuit's opinion and decision where none, in reality, exists. The First Circuit's decision to vacate punitive and lost benefits damages, using the Rule 50 standard, could not have been clearer, and for this reason, this Court should deny the Writ.

I.

THIS COURT LACKS JURISDICTION TO CONSIDER PETITIONER'S APPEAL.

This Court lacks jurisdiction to hear Petitioner's appeal. Petitioner failed to assert her Seventh Amendment argument before the First Circuit after its decision. Critically, Petitioner omitted, without any reason, a discussion of the alleged Seventh Amendment implications from her Petition for Rehearing.

In her Petition for Rehearing, Petitioner argued that the First Circuit had erred because there was *legally sufficient evidence* to support the punitive damages and lost benefits awards. Petitioner chose not to raise her Seventh Amendment arguments before the First Circuit in the Petition for Rehearing (even though she argued that the jury's award was not excessive), and, as a matter of law, has waived her right to do so now. As a rule, this Court will *not* grant certiorari to decide an issue that was *not* raised in the proceedings below.

See Pennsylvania Department of Corrections v. Yeskey, __ U.S. __, 118 S. Ct. 1952, 1956 (1998) ("Where issues are neither raised before nor considered by the court of appeals, this Court will ordinarily not consider them.").[9]

Petitioner's failure to raise her Seventh Amendment concerns earlier denied the First Circuit any opportunity to consider this issue, and constitutes a waiver. This Court should not grant certiorari to review such an unpreserved claim.[10]

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9. It is only under "extraordinary circumstances" that this Court grants review of issues not raised below. This Court has found the existence of "extraordinary circumstances" where: (i) the unraised issue is a necessary "predicate to an intelligent resolution of the question on which certiorari was granted," *see Cuyler v. Sullivan*, 446 U.S. 335, 342-343, n.6 (1980); (ii) the unraised issue is essentially part of the preserved issue on which certiorari was granted, *see Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 277 n.23 (1989); (iii) the unraised issue is an important, recurring public policy issue, *see Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); or (iv) there has been "a substantial intervening change in controlling law," *see Sure-Tan, Inc. v. National Labor Relations Board*, 467 U.S. 883, 896 n.7 (1984). Such "extraordinary circumstances" do not exist here.

10. Petitioner will likely argue that she raised the Seventh Amendment issue before the First Circuit by filing the Petition for Writ of Mandamus. However, this argument must fail. In her Petition for Rehearing, Petitioner argued that the First Circuit erred, using either a Fed. R. Civ. P. 50 or Fed. R. Civ. P. 59 standard, without raising her Seventh Amendment concerns. Her belated contention that the First Circuit violated the Seventh Amendment is nothing more than litigation afterthought. Moreover, Petitioner cannot now argue that the trial court had jurisdiction to consider the Post Appeal Motions. The general proposition that a trial court is "bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid at rest — is indisputable." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939). In this case, the trial court on remand only had jurisdiction to vacate the damages awards. It is well established that an appellate court is prohibited from using a writ of mandamus to compel a lower court to act outside its prescribed jurisdiction. *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). Insofar as the trial court lacked jurisdiction to consider the Post Trial Motions, the First Circuit was prohibited from considering whether to have the trial court remit or order a new trial.

II.

THE FIRST CIRCUIT'S DECISION DID NOT VIOLATE THE SEVENTH AMENDMENT.

This Court should deny the Writ because there is no constitutional issue at stake. The First Circuit vacated the punitive damages and lost benefits awards, using the Rule 50 standard, because Petitioner failed to offer sufficient evidence at trial to support the jury's verdict. This Court's precedent clearly vests in the First Circuit the constitutional authority to vacate the damages awards on the ground of lack of sufficiency of evidence and Petitioner concedes as much.

A. It Is Well Established That The Seventh Amendment Is Not Implicated In A Rule 50 Context.

Petitioner's reliance on *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) and *Hetzel v. Prince William County*, __ U.S. __, 118 S. Ct. 1210 (1998), *reh'g denied*, 118 S. Ct. 2336 (1998), is misplaced. *Gasperini*, *Hetzel* and their progeny, involve appellate review of a trial court's denial of a Rule 59 motion for new trial based on an excessive jury verdict, not appellate review of a trial court's denial of a Rule 50 motion for judgment as a matter of law. This is a fatal distinction, as Petitioner readily concedes. (Petition at 12-14).

In *Gasperini*, 518 U.S. at 436, the Second Circuit Court of Appeals ("Second Circuit") reversed the trial court's denial of a Rule 59 Motion because it did not properly apply a state statute limiting jury verdicts. It then remitted the damages award. This Court held that while the Seventh Amendment did not preclude an appellate court from reviewing a trial court's denial of a motion to set aside a jury verdict as excessive, its review was limited to an abuse of discretion standard. *Id.* at 433-436. This Court then reversed the Second Circuit's holding and remanded the case with instructions that the trial court apply the state statutory standard. *Id.* at 439.

Gasperini is limited by its facts. In *Gasperini*, this Court only considered the scope of appellate review of a motion for a new trial.

Id. at 431-438. The respondent in that case had not made any motion for judgment as a matter of law, and thus could only appeal from the denial of his motion for new trial. *Id.* at 415, 420. *Gasperini* has no relevance where, as here, the First Circuit entered judgment for Respondents as a matter of law pursuant to Fed. R. Civ. P. 50.

It cannot be reasonably disputed that appellate review of a Rule 50 motion for judgment as a matter of law is compatible with the Seventh Amendment. *Neely v. Eby Construction Co.*, 386 U.S. 317, 321-322 (1967). The Seventh Amendment's Re-Examination Clause is not implicated by appellate review of a Rule 50 Motion because such review consists of applying a legal standard of sufficiency of the facts and determining whether the issue should have been decided by the court, and not the jury. *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696-702 n.6 (1962). By contrast, appellate review of a Rule 59 Motion to set aside a jury verdict as excessive is, in effect, an appellate court's reexamination or reweighing of the jury's factual findings against the evidence set forth in the record, *Barry v. Edmunds*, 116 U.S. 550, 565 (1886), using an abuse of discretion standard. *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 164 (1968).

This Court decided over three decades ago that once an appellate court reverses a trial court's denial of a Rule 50 Motion, the appellate court has the authority to enter judgment thereon, without remanding the case for remittitur or a new trial. *Neely v. Eby Construction Co.*, 386 U.S. at 321-323. In *Neely*, this Court explicitly held:

> The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. *As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does, consequently, there is no constitutional bar to an appellate court granting judgment n.o.v.* . . . . Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad

> enough to include the power to direct entry of judgment n.o.v. on appeal.

Id. (emphasis supplied); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-491 (1977)(On appeal of a Rule 50 Motion, this Court determined that there was insufficient evidence at trial to support the damages claims and entered judgment thereon as a matter of law, without remand for remittitur or a new trial.).[11]

Petitioner concedes that appellate review of the legal sufficiency of a plaintiff's evidence is appropriate and constitutionally permissible. (Petition at 12). Specifically, Petitioner admits that if the First Circuit's decision on the damages issues was based on "legal insufficiency" and was, in fact, a holding that the damages issues should not have been put to the jury, it was an appropriate use of appellate power consistent with the Seventh Amendment, and *Gasperini* is inapplicable.[12] (Petition at 12-14).

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11. This Court's decision in *Hetzel* supports Respondents' position rather than Petitioner's insofar as it recognized the authority of an appellate court to review a trial court's denial of a motion under Fed. R. Civ. P. 50, and to enter judgment thereon. *Hetzel*, 118 S. Ct. at 1212.

12. Petitioner further argues that the First Circuit's decision on punitive damages could not have been based on legal insufficiency of the evidence and thus Respondents' Rule 50 Motion. Petitioner concludes that she satisfied her burden of proof on punitive damages, (Petition at 12-13, n.9 & 10), a contention expressly rejected by the First Circuit on rehearing. (P.A. at 45a-46a). The merits of this argument are irrelevant, however, because its resolution raises a unique question of state law which should not be decided by this Court. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this court's review") Moreover, this Court has already granted certiorari in *Kolstad v. American Dental Association*, 139 F.3d 958 (D.C. Cir. 1998), *cert. granted*, __ U.S. __, 119 S. Ct. 401 (1998), in order to determine the legal standard for punitive damages under Title VII, the federal counterpart to Massachusetts General Laws, chapter 151B, where a federal question exists. In any event, Petitioner has not sought review by this Court of the First Circuit's decision to vacate the damages awards on the basis of Respondents' Rule 50 Motion.

Therefore, because the First Circuit held that there was insufficient evidence as a matter of law for a reasonable jury to have awarded punitive damages or lost benefits, the First Circuit's rulings on these issues constituted a reversal of the trial court's denial of Respondents' Rule 50 Motion as to those issues. Accordingly, the First Circuit's decision, setting aside the punitive damages and lost benefits awards, did not implicate the Re-Examination Clause of the Seventh Amendment, nor conflict with this Court's rulings in *Gasperini* and *Hetzel*.

B. The First Circuit Vacated the Punitive Damages and Lost Benefits Awards Because Petitioner Failed To Offer Legally Sufficient Evidence To Support Them.

Petitioner's entire premise rests on her flawed assumption that the First Circuit ruled on Respondents' Rule 59 Motion rather than their Rule 50 Motion when it vacated the punitive damages and lost benefits awards. This premise is erroneous and unsupported in the text of the First Circuit's opinions.

The First Circuit's opinion used unambiguous language to vacate the damages awards on the ground that Petitioner had offered legally insufficient evidence to support them. The First Circuit found that Respondents' conduct was not "sufficient[ly] worthy of condemnation and deterrence," (P.A. at 33a), and vacated the punitive damages for that reason. The First Circuit did *not* analyze whether or not the verdict was excessive, did *not* find that the trial court abused its discretion and did *not* discuss remand, recalculation, reduction, remittitur or Petitioner's entitlement to a new trial.[13] In vacating the lost benefits award, the First Circuit reasoned, even more clearly, that it relied on a Rule 50 standard, when it opined that there was "no competent evidence from which a reasonable jury could conclude that [Petitioner] suffered any loss in benefits as a result of her lower salary." (P.A. at 29a-30a).

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13. Petitioner argues that the First Circuit's failure to conduct an excessiveness review or abuse of discretion analysis is a constitutional violation. (Petition at 14-16). She ignores the obvious: these reviews were unnecessary because the First Circuit decided the damages issues using a Rule 50 standard.

Petitioner also argues that Respondents did not properly appeal from the trial court's denial of its Rule 50 Motion, and therefore Respondents' "only viable challenge on appeal was to the district court's denial of the new trial motion." (Petition at 16-17). While Petitioner is entitled to her opinion, her position is without merit. To make that argument, Petitioner misrepresents the procedural history of the case. She fails to advise this Court that: (i) Respondents actually appealed from the trial court's denial of their Rule 50 Motion, (R.A. at 8a-10a); (ii) she did not challenge this procedural aspect of the Respondents' appeal; and (iii) she failed to argue the issue of Respondents' alleged waiver in her appellate brief. It must be inferred from the First Circuit's ruling that it rejected the trial court's decision on waiver. *See Sprague v. Ticonic National Bank*, 307 U.S. 161, 168-169 (1939); *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764, 770 (1st Cir. 1994) (The reviewing court's mandate "constitutes the law of the case on such issues of law as were actually considered and decided by the appellate court or were necessarily inferred from the disposition on appeal.") Petitioner presented the same old waiver argument, *verbatim*, to the trial court in her Post Appeal Motions (Plaintiff's Outline of Tasks on Remand at 2, n.1; Motion for Remittitur at 1-3, n.1), and the First Circuit in the Petition for Writ of Mandamus (Petition for Writ of Mandamus at 2-3, n.1 & 2). Both the First Circuit and the trial court on remand directly rejected the notion that the First Circuit could not have vacated the damages awards using a Rule 50 standard on the ground of Respondents' waiver. In any event, Petitioner does not seek to appeal the First Circuit's decision reversing the trial court's finding on waiver, and the issue is not before this Court.

Petitioner immediately understood that the First Circuit reversed the trial court's denial of the Respondents' Rule 50 Motion because, without explicitly saying so, it applied a Rule 50 standard. This is why Petitioner argued in her Petition for Rehearing that the First Circuit erred because she had offered legally sufficient evidence at trial supporting the punitive damages award. Although Petitioner also argued in her Petition for Rehearing that the jury award was excessive, she never addressed the Seventh Amendment argument, nor asked for any relief other than the *reinstatement of the verdicts*. Nowhere did she pray for a remand for remittitur or, alternatively, a new trial.

As a result, Petitioner cannot rely, as she purports to do, on *Hetzel v. Prince William County*, 118 S. Ct. 1210 (1998). In *Hetzel*, the Fourth

Circuit Court of Appeals ("Fourth Circuit") reversed the punitive damages award and remanded the case to the trial court for a recalculation of damages within a specific range. *Id.* at 1210. The Fourth Circuit's opinion gave no indication that it intended the trial court to deviate from the normal practice of affording a new trial option should the recalculated damages award be rejected. *Id.* at 1211, n.2. The plaintiff filed a petition for writ of certiorari but did not argue that the Fourth Circuit's mandate to the district court constituted a violation of the Seventh Amendment. *In Re: Board of County Supervisors of Prince William County*, 143 F.3d 835, 836 (1998). This Court denied certiorari. *Id.* On remand, the trial court denied the plaintiff's motion for new trial, as an alternative to remittitur, and then reversed itself. *Id.* at 836-837. This ruling then caused the defendants to file a petition for writ of mandamus with the Fourth Circuit, which granted the Petition. *Id.* at 838-839. The plaintiff sought certiorari for a second time. The defendants argued that she had waived her rights because she failed to raise the Seventh Amendment in her first petition for writ of certiorari. *Hetzel*, 118 S. Ct. at 1211, n.2.

This Court held that it had jurisdiction to hear the case even though the plaintiff had not previously raised her Seventh Amendment claim. Because the Fourth Circuit's initial opinion seemed to follow the traditional remand for remittitur or new trial formula, it was not until the trial court interpreted the remand *not* to include a new trial option that the plaintiff became aware that her Seventh Amendment rights were implicated. *Id.* The plaintiff had not raised the claim when the first petition for certiorari was filed because, as this Court explained, she "reasonably construed" the Court of Appeals' decision as not depriving her of the right to a new trial. *Id.*

This case is readily distinguished. In no uncertain terms, the First Circuit vacated the punitive damages and lost benefits awards on the basis of a lack of sufficient evidence. Petitioner could *not* have reasonably construed the First Circuit's rulings and language in any other way, and, in fact, she did not (as evidenced by her arguments in the Petition for Rehearing). And yet, Petitioner manipulated the trial court unashamedly by filing her Post Appeal Motions *as if the First Circuit had remanded the damages awards for remittitur or, alternatively, a new trial.* She attempted to continue this manipulation

by then seeking review of the trial court's unequivocal rejection of these groundless Seventh Amendment issues before the First Circuit by way of a Petition for Writ of Mandamus. The purpose of this maneuvering was to enable her to cloak herself in *Hetzel* and *Gasperini*, as though Fed. R. Civ. P. 59, and not Fed. R. Civ. P. 50, was the basis of the First Circuit's opinion. This Court should not condone her abuse of the legal process by granting the Writ.

Shamelessly, Petitioner has not withdrawn this Petition after the First Circuit denied her Petition for Writ of Mandamus. In that opinion, the First Circuit directly rejected Petitioner's contention that the First Circuit intended to remand the damages award for remittitur, or alternatively a new trial. The First Circuit stated, in no uncertain terms, that its intent was that "judgment enter for defendants on the punitive damages." (R.A. at 1a). It described the language of its March 18, 1998 decision as "clear" and cited its prior language that it "reverse[d]" the award of punitive damages because Respondents' intentional misconduct did not "call for punishment and deterrence beyond that secured by the compensatory award." (R.A. at 1a-2a). The First Circuit concluded that Petitioner "failed to establish *any basis* for the requested relief." (R.A. at 2a) (emphasis supplied). "[T]he court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940).

Even so, Petitioner still refuses to hear the message that she has lost her punitive damages and lost benefits awards. This Court should convince her by denying the Writ.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING THE PETITION FOR A WRIT OF MANDAMUS DATED AND ENTERED NOVEMBER 25, 1998

United States Court of Appeals
For the First Circuit

No. 98-2150

IN RE:

MARJORIE C. MCMILLAN, DR.,

Petitioner,

Stahl, *Circuit Judge*,
Godbold* and Cyr, *Senior Circuit Judges*

ORDER OF COURT

Entered: **November 25, 1998**

Petitioner seeks a writ of mandamus directing the district court to afford her a remittitur in her punitive damages award or the option of a new trial. She contends that, as part of our disposition of the recent appeal, *see McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals*, 140 F.3d 288 (1st Cir. 1998), this court intended that such relief would be provided on remand. To the contrary, our intention was that judgment enter for defendants on the punitive damages issue. And we think the language of the opinion (despite some admitted imprecision) made this clear. *See, e.g., id.* at 295

* Of the Eleventh Circuit, sitting by designation.

("[w]e . . . reverse the award of punitive damages"); *id.* at 307 ("we cannot say, on the basis of the record before us, that [defendants'] intentional misconduct calls for punishment and deterrence beyond that secured by the compensatory award"). Petitioner has thus failed to establish any basis for the requested relief, much less a "clear entitlement" thereto as is required for the extraordinary writ of mandamus. *See, e.g., In re Martinez-Catala*, 129 F.3d 213, 217 (1st Cir. 1997).

The petition for a writ of mandamus is denied.

By the Court:
[stamp] JANICE M. O'NEIL
Clerk.

cc: Messrs. Voltz, Cohn, Ms. Tearney & Ms. Rudavsky

Certified Copy to U.S. District Court Clerk, Tony Anastas
Certified Copy to Hon. Richard Stearns

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS ON RECONSIDERATION OF PLAINTIFF'S PETITION FOR COSTS AND ATTORNEYS' FEES DATED AND DOCKETED OCTOBER 28, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 92-11178-RGS

DR. MARJORIE C. MCMILLAN

v.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, DR. GUS THORNTON, and DR. PAUL GAMBARDELLA

MEMORANDUM AND ORDER ON RECONSIDERATION OF PLAINTIFF'S PETITION FOR AN AWARD OF COSTS AND ATTORNEYS' FEES

October 28, 1998

STEARNS, D.J.

The Appeals Court in *McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals,* 140 F.3d 288 (1st Cir. 1998), directed this court to revise its amended judgment of November 15, 1996, in four respects: (1) by reducing the back pay award to Dr. McMillan by 21% (to $151,888) to reflect the fact that there was no evidentiary support justifying the jury's award of lost employee benefits; (2) by entering judgment

for the Massachusetts Society for the Prevention of Cruelty to Animals and Dr. Thornton on the claim for punitive damages; (3) by recalculating the award of attorneys' fees to reflect a lower billing for tasks that could have been performed by a less experienced attorney or legal assistant, rather than by Dahlia Rudavsky, plaintiff's lead counsel; and (4) by reconsidering the court's choice of 20% as an appropriate discount to reflect the allocation of attorney effort between successful and unsuccessful claims.

Plaintiff raises several ancillary issues that can be disposed of in summary fashion. The direction of the First Circuit panel with respect to the employee benefit award is unambiguous. "Because there was no competent evidence from which a reasonable jury could conclude that Dr. McMillan suffered any loss in benefits as a result of her lower salary, Dr. McMillan's back pay award should be accordingly reduced by the amount of the lost benefits award." 140 F.3d at 305-306. Plaintiff's belated attempt to marshal such evidence comes too late. Similarly, as I have previously ruled, there is no ambiguity in the Appeals Court's holding that a reasonable jury could not have found the defendants' conduct "sufficiently worthy of condemnation and deterrence to justify exemplary damages" and that the defendants' misconduct did not call "for punishment and deterrence beyond that secured by the compensatory award." 140 F.3d at 307. Plaintiff's argument that she is entitled to a remittitur is without merit as there is nothing to remit. Finally, there is no basis on which to award plaintiff as "liquidated" damages the sum awarded by the jury on her federal Equal Pay Act claim. As I instructed the jury (without objection): Dr. McMillan "is not entitled to collect twice under federal and state law for the same damages. I would like you to consider the state law issue separately from the federal claim,

that is, without considering any amount of money that might have been awarded under the federal claim. If you should award damages on both the state and federal counts, I will enter judgment for Dr. McMillan on whichever is the larger of the two awards." She was not then, and is not now, entitled to duplicative damages.

I have reviewed again the revised fee petition and the plaintiff's and defendants' responses to the Appeals Court's mandate regarding the reallocation of attorney hours. I have given line-by-line consideration to the disputed billings.[1] Of the hours billed by Ms. Rudavsky, I have identified 289.5 hours that could have been performed by an associate lawyer. Similarly, I have identified 32.6 hours of work that should more appropriately have been charged at a law clerk's rate, and 19.5 hours spent on tasks that could have been performed by a paralegal or legal secretary.[2] Consequently, I have reduced the revised fee request (before the discount)[3] to $496,381, substituting the hourly rates I had previously established for associates ($128), law clerks ($80), and legal assistants ($60), for the 341.6 hours that I have deemed inappropriately billed at the partner's rate ($285). To this sum I have added 25.4 hours at the partner's hourly rate of $285 to reflect time that I believe would have been reasonably spent by Ms. Rudavsky in tasking and supervising her hypothetical assistants, resulting in an

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1. By my calculation, I have devoted 19.2 hours to this task.

2. A number of these reallocations are not disputed by Ms. Rudavsky.

3. Defendants' methodology fails to recognize that the original award of $447,928 incorporated the 20% discount rejected by the Appeals Court.

award of attorneys' fees of $503,620. This figure, in turn, has been reduced by 8% to reflect effort spent on the unsuccessful and unrelated claims (breach of contract and infliction of emotional distress), resulting in a final award of $463,330 in attorneys' fees and $18,889 in costs.[4] Using a similar methodology, I have determined that Ms. Rudavsky should receive an additional award of $63,156 in supplemental fees and $390.68 in costs.[5]

---

4. The Appeals Court rejected my original determination that a 20% deduction was a fair apportionment between successful and unsuccessful claims. In a footnote, it suggested that 3% might be an appropriate deduction, while acknowledging that the fee petition is not amenable to easy analysis. The 3% figure appears to be based solely on Ms. Rudavsky's estimate of the hours that she spent on the unsuccessful and unrelated claims. While I accept the judgment that 20% was too high a figure, I also believe from my experience with this prolonged case, that 3% is too low. I also believe that the defendants are correct that the total of hours expended is not the only consideration in selecting an appropriate discount. I have made the best choice that I can based on the entire record of the case. No more precise result can be achieved without undertaking further litigation (as defendants request) which will generate yet another disputed petition for attorneys' fees. I note parenthetically that plaintiff has not objected to the 20% deduction in the amount originally awarded for costs.

5. I have reallocated 66.9 hours of Ms. Rudavksky's time as follows: 56.5 hours to an associate's billing; 9.1 hours to that of a law clerk; and 1.3 hours to that of a legal assistant. I have added back in 5 hours of supervisor's time at the partner's rate. Although defendants object to the $10 an hour raise that Ms. Rudavsky has awarded herself and her subordinates, I do not find the adjustment unreasonable. I have made no percentage reduction in the amount awarded on Ms. Rudavsky's representation that she has deleted from the supplemental petition all time spent on the two unsuccessful claims, including time spent on the unsuccessful cross appeal.

Appendix B

ORDER

Plaintiff as the prevailing party shall within ten days of this Order submit a proposed Revised Amended Judgment consistent with this memorandum, the prior rulings of the court, and the decision of the Court of Appeals. Defendants shall have seven days to respond.

SO ORDERED.

s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE

APPENDIX C — EXCERPTS OF RESPONDENTS' BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AND FILED JUNE 6, 1997

[p. 39 and pp. 41-42]

* * *

2. McMillan Is Not Entitled to Recover For "Lost Benefits" Because She Did Not Prove That She Lost Them.

The parties do not dispute that the jury added to McMillan's back pay award an additional 21% to represent the value of the "lost benefits" she purportedly suffered. McMillan testified at trial that she budgeted the value of these benefits for her supervisees at 21% of their salaries.[38] [A. 1226-1227] McMillan offered no evidence of any out of pocket loss. *Taylor v. Central Pennsylvania Drug and Alcohol Services Corp.*, 890 F. Supp. 360, 372 (M.D. Pa. 1995). Defendants are entitled to a remand for a recalculation of the back pay award, if the judgment is not vacated.

* * *

B. THIS COURT SHOULD SET ASIDE THE PUNITIVE DAMAGES AWARD AGAINST THE MSPCA AS A MATTER OF LAW OR GRANT DEFENDANTS A NEW TRIAL ON THIS ISSUE.

McMillan did not offer sufficient evidence, as a matter of law, that she was entitled to punitive damages. This Court has

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38. This was objected to and overruled. [A.1226-1227]. Defendants raised this issue in their posttrial motions. [A.492; 499; 502].

held that "intentional interference with [civil] rights, standing alone, is not enough [to permit punitive damages]; there must be *aggravating circumstances.*" *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987) (quoting *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (emphasis added)). McMillan pointed to no aggravating circumstances. Even assuming this Court concludes that McMillan, as a matter of law, offered sufficient evidence of intent or pretext, there is still no evidence that was objectively overwhelming in nature, as is required by law. An award of $306,912.50 is not justified to punish the MSPCA, a charitable organization, or Thornton who, after all, made McMillan the Director of Radiology.

The punitive damages awarded in this case against the MSPCA and Thronton are grossly excessive, shocking to the conscience, and, as a matter of law, should be set aside. *See, e.g., Fishman v. Clancy*, 763 F.2d 485, 489 (1st Cir. 1985).

Defendants further contend that by permitting the jury to hear *irrelevant evidence* of the matter in which McMillan felt she was treated by Gambardella, the jury's consideration of the punitive damages issue was impermissibly tainted. The jury heard testimony concerning Gambardella's termination of McMillan, including how he interrupted a procedure, gave her 15 minutes to leave the building and refused her access to Angell subsequently. The jury was apparently outraged.[41] They found Gambardella liable for tortious interference. The court set aside that verdict holding that no reasonable jury could have concluded that Gambardella wrongfully interfered with McMillan's relationship with Angell. [AD.49-51].

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41. The Court concluded the jury ignored its instruction that the termination of McMillan was legally proper, [AD.9], and was so offended by it, it imposed liability on Gambardella.

Appendix C

In *Bain v. City of Springfield*, 424 Mass. 758, 678 N.E.2d 155 (1997), the Supreme Judicial Court ("SJC") considered whether the punitive damages awarded in a case of sex discrimination and retaliation case were excessive. The SJC remanded the case for a new trial on punitive damages because the jury was allowed to consider legally irrelevant elements in arriving at their award, such as the plaintiff's subjective descriptions of the defendant's appearance and conduct. *Id.* at 768-769, 678 N.E.2d at 162. For the same substantive reasons, defendants should be granted a new trial or the punitive damages award set aside.

* * * *

Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

No. 98-780

In The

Supreme Court of the United States

October Term, 1998

DR. MARJORIE C. McMILLAN,

Petitioner,

v.

MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS; DR. GUS THORNTON AND DR. PAUL GAMBARDELLA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

What is most notable about respondents' brief opposing petitioner's petition for a writ of certiorari, is that respondents do not contest the central premise of petitioner's argument: that the Seventh Amendment to the United States Constitution bars an appellate court from voiding a punitive damages award that was challenged for the first time after the jury rendered its verdict. It appears therefore that even respondents concede that the underlying Seventh Amendment issue in this case warrants a grant of certiorari.

Furthermore, respondents agree with petitioner that the court of appeals in this case never conducted a review for excessiveness of the size of the punitive damages verdict. Nor do respondents dispute petitioner's assertion that the court of appeals could only properly have ordered judgment for respondents on punitive damages under the rubric of a motion for judgment as a matter of law under F.R.Civ.P. Rule 50.

Rather, respondents oppose the petition on purely procedural grounds, asserting that

a) the court of appeals did not make its ruling pursuant to F.R.Civ.P. Rule 59, but instead, "implicitly" made its ruling under F.R.Civ.P. Rule 50, and therefore acted within its authority in vacating the district court's award of punitive damages to petitioner and in instructing the district court to enter judgment for respondents on the matter of punitive damages;

b) petitioner failed to appeal the appellate court's "reversing the trial court's finding

on waiver" (*i.e.*, the district court's ruling that it could not consider judgment on punitive damages as a matter of law under F.R.Civ.P. Rule 50(b) because respondents had failed to move for a directed verdict under F.R.Civ.P. Rule 50(a)); and that petitioner's failure to make such an appeal precludes this Court from considering it; and

c) in any case, petitioner waived her Seventh Amendment argument by failing to raise it in the court of appeals in her motion for rehearing.

All of these arguments lack merit.

I. THE COURT OF APPEALS RECOGNIZED ITS LIMITED ROLE IN REVIEWING THE PUNITIVE DAMAGES AWARDED BY THE JURY

In arguing that the court of appeals did not decide the punitive damages issue under Rule 59, respondents rely heavily on a fundamentally mistaken reading of the appellate court's decision. Respondents contend that the court of appeals could not have been analyzing the punitive damages issue for excessiveness under Rule 59, because that court did not find that the trial court had abused its discretion with respect to punitive damages. This is telling, respondents contend, because unlike Rule 50 motions, Rule 59 motions are reviewed on appeal under an abuse of discretion standard. At page 3 of their opposition, respondents plainly state:

> The First Circuit did not find that the trial court abused its discretion.

Brief in opposition at 3. Similarly, at page 12, respondents state:

> The First Circuit did *not* analyze whether or not the verdict was excessive [and] did *not* find that the trial court abused its discretion. . . .

Brief in opposition at 12 (emphasis by respondents).

In fact however, contrary to the statements in respondents' brief, the First Circuit expressly held both that the trial court had abused its discretion *and* that the punitive damages award was excessive. At the end of its discussion of the punitive damages issue, the First Circuit stated its holding quite clearly, concluding:

> We therefore hold that the district court abused its discretion in upholding the award of punitive damages, and that the award of punitive damages in this case constitutes a grossly excessive award of damages that shocks the conscience.

Appendix to Petition for Certiorari, 33a (footnote omitted).

Respondents' argument that the court of appeals was not analyzing the punitive damages issue as an appeal of the trial court's Rule 59 ruling is therefore quite mistaken. Indeed, the fact that, contrary to the respondents' characterization of the court of appeals' decision, that court expressly invoked the abuse of discretion standard, and the fact that it also held that the punitive damages awarded by the jury were "excessive" and "shock[ing to] the conscience" make clear that the court was well aware that it was conducting a Rule 59 review, since abuse of

discretion, excessiveness and "shocking to the conscience" analyses are applicable only in reviewing a trial court's decision on a motion brought under Rule 59.

Were there still any question on this point however, that question could be answered by referring to the court of appeals' unequivocal language in the introduction to the punitive damages section of its opinion, in which the court unmistakably acknowledged the strict limitations on its appellate role in reviewing the punitive damages awarded by the jury. In introducing its analysis of the punitive damages issue, the First Circuit wrote:

> In reviewing an award of punitive damages, our role is to determine *whether the district court abused its discretion* in determining that the jury's award of punitive damages was within the confines of state law and that defendants are not entitled to a new trial or remittitur. Although juries have wide discretion in determining the amount of punitive damages, and the trial court has broad discretion to affirm the jury's award of damages, *appeals courts should reduce or set aside awards that are "grossly excessive" or "shocking to the conscience."*

Appendix to Petition for a Writ of Certiorari, 31a (emphasis added).

It could not be clearer that the court of appeals properly understood its role: to review the jury's punitive damages award for excessiveness under an abuse of discretion standard. The First Circuit's error resulted from the fact that while the court repeatedly paid lip service to its strictly limited role in reviewing the punitive damages awarded below, it in fact went well beyond that limited

role and unconstitutionally ordered a remittitur of the punitive damages to zero, in clear violation of the Seventh Amendment. It is that violation of the Seventh Amendment, occurring for the first time in the Court of Appeals, that can only be remedied by this Court and is the reason for this petition.

II. RESPONDENTS' ASSERTIONS THAT THE FIRST CIRCUIT RULED APPROPRIATELY UNDER F.R.CIV.P. RULE 50 CANNOT STAND IN LIGHT OF RESPONDENTS' FAILURE TO MOVE FOR A DIRECTED VERDICT ON PUNITIVE DAMAGES OR ON EMPLOYMENT BENEFITS

Respondents' entire argument proceeds from mistaken premises that the First Circuit somehow "implicitly" overruled the trial court's decision rejecting their Rule 50(b) motion for judgment as a matter of law; that the appellate court had the power to do so; and that, even if the appellate court overreached, petitioner failed to preserve her argument or raise it in her petition for certiorari.

However, respondents' claims founder on a simple fact that respondents do not contest: respondents failed to challenge the district court's submission to the jury of the issues of punitive damages and employment benefits in their motion for a directed verdict under Rule 50(a). This failure is fatal to their argument. *See Neely v. Eby Construction Co.*, 386 U.S. 317, 325 (1967) (an appellate court may not order judgment n.o.v. under Rule 50(b) where the verdict loser has failed strictly to comply with the Rule's procedural requirements). The First Circuit has followed the teaching of *Neely* closely, as it must, and has

consistently refused to review district courts' denials of motions for judgment as a matter of law under Rule 50(b) where the moving party failed to raise the issue in question previously in a motion for a directed verdict under Rule 50(a). *See, e.g., O'Connor v. Huard,* 117 F.3d 12, 17 (1st Cir. 1997), *cert. denied,* ___ U.S. ___, 188 S.Ct. 691 (1998) ("A party may not raise a ground for judgment notwithstanding the verdict that was not previously presented to the trial court in a motion for a directed verdict." (citations omitted)); *Simon v. Navon,* 71 F.3d 9, 13 (1st Cir. 1995) (same, noting that "[o]nce abandoned, a claim for judgment as a matter of law may not be reviewed on appeal except upon a showing of plain error resulting in a manifest miscarriage of justice"); *Robles-Vazquez v. Garcia,* 110 F.3d 204, 206 (1st Cir. 1997) (same). *See also Courtney v. Safelite Glass Corp.,* 811 F. Supp. 1466, 1470 (D. Kan. 1992) (refusing to grant judgment as a matter of law on damages issues where moving party failed to raise the issues with particularity in its Rule 50(a) motion, before the case went to the jury). Respondents do not even attempt to explain why they should have been exempted from this uniformly-enforced rule.

It is also uncontested that the district court denied respondents' post-verdict Rule 50(b) motion for judgment as a matter of law on these issues precisely because of respondents' failure to raise them in the prerequisite Rule 50(a) motion for a directed verdict. Appendix to Petition for a Writ of Certiorari, 53a. Furthermore, although respondents claim to have challenged that ruling of the district court on appeal, they can point to no language in their appellate brief which genuinely raises the issue. This is so even though respondents faced an extremely

steep burden in attempting to revive their fatally-flawed motion: they would have had to demonstrate "plain error resulting in a manifest miscarriage of justice." *Simon v. Navon, supra.* Nothing approaching the sort of argument that would have had to have been made appears in the portions of respondents' appellate brief dealing with the damages issues in question. Indeed, the concept that the district court committed plain error in denying the Rule 50(b) motion is never mentioned. *See* Appendix to Brief in Opposition at 8a-10a. Again, respondents fail to explain this lacuna in their argument.

Finally, the decision of the court of appeals may be searched in vain for any discussion of whether the district court's decision constituted plain error resulting in a manifest miscarriage of justice, sufficient to warrant setting aside the general rule that judgment will not be granted a party as a matter of law who has failed to move for a directed verdict. That issue simply never came up because it was never raised on appeal. *See* Appendix to Petition for a Writ of Certiorari at 31a-33a. Respondents' assertion to the contrary is nothing more than wishful thinking.

In light of respondents' utter failure, both in the district court and the court of appeals, to act to preserve their challenge to the punitive damages award for lack of evidence, it is ironic indeed that they accuse petitioner of failing to raise in the instant petition the court of appeals' alleged "reversal" of the district court's ruling denying their Rule 50(b) motion for procedural inadequacy. Petitioner had no obligation to challenge a "reversal" that did not occur. Petitioner properly identified the error in the First Circuit's decision, which is the core of the instant petition: namely, the court of appeals' unconstitutionally

transgressing the boundaries that the court itself articulated as limiting its role on appeal under Rule 59.

III. PETITIONER DID NOT WAIVE HER SEVENTH AMENDMENT ARGUMENT BY FAILING TO RAISE IT IN HER PETITION FOR REHEARING

Obviously, petitioner could not argue in her brief in chief on appeal that the court of appeals violated the Seventh Amendment, since that issue only arose once the appellate court had issued its decision. Respondents nevertheless argue that because petitioner filed a petition for rehearing, and did not raise in that motion the Seventh Amendment issue that she has raised in her petition for a writ of certiorari, that she is barred from doing so now.

This argument must also fail. Respondents cite no authority for the proposition that making an argument via a F.R.A.P. Rule 40 petition for rehearing is a prerequisite for filing a petition for a writ of certiorari. Nor do they cite any authority for the proposition that a party's making other arguments in a motion for rehearing bars a certiorari petition raising constitutional claims that could have been, but were not, made via a petition for rehearing. In the absence of any authority holding that petitioner's constitutional claim is barred, this Court should consider petitioner's arguments on the merits, and not deem them waived.

Petitioner has raised an important issue regarding an appellate court's encroachment on litigants' rights to a jury trial. Only this Court can correct the court of appeals' constitutional error. Respondents' groundless

procedural cavils should not deter this Court from examining the important Seventh Amendment principles here at stake.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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